No. 06-984 *** CAPITAL CASE ***
Title: Jose Ernesto Medellin, Petitioner
v.
Texas
Docketed: January 18, 2007
Lower Ct: Court of Criminal Appeals of Texas
Case Nos.: (AP-75207)
Decision Date: November 15, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 16 2007	Petition for a writ of certiorari filed. (Response due February 20, 2007)
Feb 6 2007	Order extending time to file response to petition to and including March 22, 2007.
Feb 6 2007	Blanket consent to the filing ot amicus briefs in support of either party received from counsel for the petitioner.
Mar 21 2007	Brief amicus curiae of Government of the United Mexican States filed.
Mar 22 2007	Brief amicus curiae of United States filed.
Mar 22 2007	Brief amicus curiae of International Court of Justice Experts filed.
Mar 22 2007	Brief of respondent Texas in opposition filed.
Apr 4 2007	DISTRIBUTED for Conference of April 20, 2007.
Apr 4 2007	Reply of petitioner Jose Ernesto Medellin filed. (Distributed)
Apr 23 2007	DISTRIBUTED for Conference of April 27, 2007.
Apr 30 2007	Petition GRANTED.
May 29 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 28, 2007.
Jun 26 2007	Brief amici curiae of European Union and Members of International Community filed.
Jun 27 2007	Brief amicus curiae of Government of the United Mexican States filed.
Jun 28 2007	Brief amicus curiae of Former United States Diplomats filed.
Jun 28 2007	Brief amicus curiae of United States filed.
Jun 28 2007	Brief amicus curiae of EarthRights International in support of neither party filed.
Jun 28 2007	Brief amicus curiae of International Court of Justice Experts filed.
Jun 28 2007	Brief amicus curiae of American Bar Association filed.
Jun 28 2007	Brief amici curiae of Ambassador L. Bruce Laingen, et al. filed.
Jun 28 2007	Brief amici curiae of Foreign Sovereigns, et al. filed.
Jun 28 2007	Brief of petitioner Jose Ernesto Medellin filed.
Jun 28 2007	Motion to dispense with printing the joint appendix filed by petitioner Jose Ernesto Medellin.
Jul 11 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jul 16 2007	The time within which to file respondent's brief on the merits is extended to and including August 23, 2007.
Aug 13 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 14 2007	SET FOR ARGUMENT Wednesday, October 10, 2007.

Aug 14 2007	Record received from Court of Criminal Appeals of Texas. (1 box)
Aug 16 2007	CIRCULATED.
Aug 20 2007	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Aug 22 2007	Brief amicus curiae of Mountain States Legal Foundation filed. (Distributed)
Aug 23 2007	Brief of respondent Texas filed. (Distributed)
Aug 23 2007	Appendix of respondent filed. (Distributed)
Aug 23 2007	Brief amici curiae of Commonwealth of Virginia, 27 Other States, and Puerto Rico filed. (Distributed)
Aug 23 2007	Brief amicus curiae of Former Senior Officials of the Department of Justice filed. (Distributed)
Aug 23 2007	Brief amicus curiae of Constitutional and International Law Scholars filed. (Distributed)
Aug 23 2007	Brief amici curiae of Randy and Sandra Ertman and the Criminal Justice Legal Foundation filed.
Aug 23 2007	Brief amici curiae of Washington Legal Foundation, Randy and Sandra Ertman, and Allied Educational Foundation filed. (Distributed)
Sep 7 2007	Application (07A214) to file a reply brief on the merits in excess of the page limits, submitted to Justice Scalia.
Sep 12 2007	Application (07A214) denied by Justice Scalia.
Sep 25 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 27 2007	Reply of petitioner Jose Ernesto Medellin filed. (Distributed)

No. 06-_____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, I.C.J. No. 128 (judgment of Mar. 31, 2004), the International Court of Justice determined that 51 named Mexican nationals, including petitioner, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the judgment by giving those 51 individuals review and reconsideration in the state courts. However, the Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the *Avena* judgment or the President's determination.

This case presents the following questions:

1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

PARTIES

All parties to the proceedings are named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is captioned *Ex parte Medellín*, has been designated for publication in S.W.3d, but the volume and page numbers are not yet available. The opinion is available at 2006 WL 3302639 and at 2006 Tex. Crim. App. LEXIS 2236, and it is reproduced beginning at page 1a in the Appendix to this Petition.

JURISDICTION

The final judgment of the Court of Criminal Appeals of Texas, that state's court of last resort in criminal matters, was entered on November 15, 2006. This petition is being filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions, which are reproduced beginning at page 80a in the Appendix:

1. United States Constitution, art. II, § 1, sentence 1; *id.* § 2, cls. 2-3; *id.* § 3;

2. United States Constitution, art. VI, cl. 2;

3. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. I, T.I.A.S. No. 6820, 21 U.S.T. 77, 325 (opened for signature April 24, 1963) (the "Optional Protocol");

4. United Nations Charter, art. 94(1), T.S. No. 993, 59 Stat. 1031, 1051 (opened for signature June 26, 1945) (the "UN Charter");

5. Statute of the International Court of Justice, arts. 36(1), 59-60, T.S. No. 993, 59 Stat. 1031, 1060, 1062-63 (opened for signature June 26, 1945) (the "ICJ Statute");

6. United Nations Participation Act of 1945, §§ 2(a), 3, *codified as amended at* 22 U.S.C. §§ 287(a), 287a;

7. Rev. Stat. § 2001, *codified as amended at* 22 U.S.C. § 1732;

8. Omnibus Diplomatic Security and Antiterrorism Act of 1986, § 103(a)(1)(D), *codified as amended at* 22 U.S.C. § 4802(a)(1)(D); and

9. Texas Code of Criminal Procedure, art. 11.071, § 5(a), (d)-(e).

STATEMENT OF THE CASE

On December 10, 2004, this Court granted petitioner José Ernesto Medellín a writ of certiorari to decide whether, under the Supremacy Clause of the Constitution, courts in the United States must give effect to the United States' treaty obligation to comply with the judgment of the International Court of Justice ("ICJ") in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, I.C.J. No. 128 (judgment of Mar. 31, 2004) ("*Avena*") (reproduced at 86a-186a). In *Avena*, the ICJ had held, among other things, that the United States was required to give review and reconsideration to the convictions and sentences of 51 nationals of Mexico, including Mr. Medellín, whose rights under the Vienna Convention on Consular Relations had been violated.

While the case was pending in this Court, the President of the United States acted to ensure that courts in the United States will in fact comply with the United States' international obligation to give effect to the *Avena* judgment in the cases of Mr. Medellín and the other 50 nationals of Mexico named in the judgment. Specifically, the

President determined that the United States would "hav[e] State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." 187a.

Given the prospect that Mr. Medellín would obtain relief in the state court and the procedural obstacles to reaching the merits of his case on federal habeas corpus, this Court by a 5-4 vote dismissed the writ as improvidently granted. *Medellín v. Dretke*, 544 U.S. 660 (2005) (*per curiam*). At the same time, both the Court and several of the individual justices indicated that review in this Court would remain available should petitioner not receive relief in the Texas courts. *Medellín v. Dretke*, 544 U.S. at 664 & n.1, 666 & n.4 (*per curiam*); *id.* at 668-69 (Ginsburg, J., concurring, joined by Scalia, J.); *id.* at 694 (Breyer, J., dissenting, jointed by Stevens, J.).

The circumstances contemplated by the Court in its earlier decision have now come to pass. On March 24, 2005, Mr. Medellin filed an application for post-conviction relief in the Texas Court of Criminal Appeals. That court set the case for briefing and heard oral argument, at which the United States as *amicus curiae* supported Mr. Medellín's request for relief. On November 15, 2006, however, the Texas court denied relief, expressly holding that the President of the United States has no authority to enforce the undisputed treaty obligation of the United States to abide by the *Avena* judgment in the cases of the Mexican nationals addressed in that judgment. For all the reasons the Court granted certiorari previously, and for additional reasons in light of the President's express determination that the United States must comply with the *Avena* judgment in this case, Mr. Medellín again seeks review in this Court.

A. The *Avena* Judgment

Article 36 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261 (opened for signature Apr. 24, 1963) ("Vienna Convention"), enables consular officers to protect the rights of nationals who are detained in foreign countries. Among other things, Article 36 requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay."

Although the United States has vigorously insisted on strict compliance with Article 36 when Americans have been detained overseas, compliance by state and local officials in the United States itself has ranged from spotty to nonexistent. *See, e.g., Medellín v. Dretke*, 544 U.S. at 674 (O'Connor, J., dissenting) (noting the "vexing problem" of "individual States' (often confessed) noncompliance" with the Vienna Convention, which is "especially worrisome in capital cases"). In early 2003, Mexico brought the *Avena* case against the United States in the ICJ, seeking a remedy for violations of the Vienna Convention rights of 54, eventually 52, individual Mexican nationals—including petitioner Medellín—who were then under sentence of death in the United States.

The ICJ is "the principal judicial organ of the United Nations." UN Charter, art. 92. By ratifying the UN Charter—which is a treaty ratified by over 190 nations, including the United States and Mexico—"[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." UN Charter, art. 94(1). Moreover, all parties to the UN Charter "are *ipso facto* parties to the Statute of the International Court of Justice," UN Charter, art. 93(1), which forms "an integral part of the [UN] Charter," *id.*, art.

92. Indeed, in ratifying the UN Charter, the United States made explicit that it was also ratifying the ICJ Statute. *See* Proclamation of Ratification of UN Charter and ICJ Statute, 59 Stat. 1031, 1031 (1945). Under the terms of the ICJ Statute, judgments in cases submitted to the ICJ are "final and without appeal," ICJ Statute, art. 60, but are binding only "between the parties and in respect to [the] particular case," *id.*, art 59.

The ICJ's jurisdiction in any particular case depends entirely on the consent of the parties. *Id.*, art. 36(1). By ratifying the UN Charter and ICJ Statute, the United States agreed to abide by judgments in any case to which it was a party, but it did not consent to jurisdiction in any particular case. In the *Avena* case, Mexico invoked the Vienna Convention's Optional Protocol, to which both the United States and Mexico were parties. The Optional Protocol provides, in relevant part, that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, art. I.

The United States fully participated in the *Avena* proceedings before the ICJ. After extensive briefing and oral argument, the ICJ rendered a judgment that expressly adjudicated Mr. Medellín's own rights and those of the other Mexican nationals whose cases were before the ICJ. 86a-186a. Specifically, the ICJ held that the United States had breached Article 36(1)(b) of the Vienna Convention in the cases of 51 of the Mexican nationals, including Mr. Medellín, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena*, ¶¶ 106(1)-(2), 153(4) (155a-156a, 183a). In 49 of those cases, including that of Mr. Medellín, the ICJ held that the

United States had also violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals." *Id.*, ¶¶ 106(3), 153(5)-(6) (156a, 183a-184a). And in 34 cases, including that of Mr. Medellín, the ICJ held that the breaches of Article 36(1)(b) also violated the United States' obligation under Article 36(1)(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." *Id.*, ¶¶ 106(4), 153(4), 153(7) (156a, 183a, 184a).

As to remedies, the ICJ first denied Mexico's request for annulment of the convictions and sentences. *Id.*, ¶ 123 (166a). However, recognizing that Article 36(2) of the Convention requires the laws of the signatory states to give "full effect" to the purposes of the rights accorded by Article 36, the ICJ held that United States courts must provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals as a remedy for the violations of Article 36(1) in their cases. *Id.*, ¶¶ 121-22, 153(9) (165a, 185a). The ICJ specified that, *first*, the required review and reconsideration must take place as part of the "judicial process;" *second*, procedural default doctrines could not bar the required review and reconsideration; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration occurred must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, ¶¶ 113-14, 122, 134, 138-39, 140 (160a-161a, 165a, 170a-171a, 173a-174a).

B. Prior Proceedings Involving Mr. Medellín in Texas and Federal Courts

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellín, a Mexican national, told the arresting officers that he was born in Mexico, and informed Harris County Pretrial Services that he was not a United States citizen. Nevertheless, Mr. Medellín was not advised of his article 36 right to seek assistance from the Mexican consul, nor was the Mexican consulate ever notified of his detention. Mr. Medellín was unaware of his right to seek consular assistance at any time either before or during his capital trial.[1]

At his trial, Mr. Medellín was convicted of capital murder and sentenced to death. On direct appeal, by unpublished order dated March 19, 1997, the Texas Court of Criminal Appeals affirmed his conviction and sentence.

On April 29, 1997, Mexican consular authorities learned of Mr. Medellín's detention for the first time when he wrote to them from death row, and they promptly began rendering him assistance. Memorial of Mexico at App. A, ¶ 235, *Avena*, 2004 I.C.J. 128. On March 26, 1998, Mr. Medellín filed a state application for a writ of *habeas corpus* arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. The trial court denied relief and, by unpub-

[1] At the time Mr. Medellín was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and most importantly, ensuring that Mexican nationals were represented by competent and experienced defense counsel. *See* Memorial of Mexico at 11-38, *Avena*, 2004 I.C.J. 128; *see also Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national).

lished order dated September 7, 2001, the Texas Court of Criminal Appeals again affirmed.

On November 28, 2001, Mr. Medellín filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellín again raised, among others, an Article 36 claim. On June 26, 2003, the District Court denied his petition, and on May 20, 2004, the Fifth Circuit denied a certificate of appealability.

While Mr. Medellín's case was pending before the Fifth Circuit, the ICJ decided *Avena*. Although the effect of the *Avena* judgment had not been briefed or argued, the Fifth Circuit considered the judgment before following prior Fifth Circuit precedent holding that Article 36 of the Vienna Convention was not judicially enforceable. *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

Mr. Medellín petitioned for certiorari on the question of the effect of the *Avena* judgment in the cases of Mexican nationals whose rights the ICJ adjudicated in *Avena*, and this Court granted the petition. *Medellín v. Dretke*, 543 U.S. 1032 (2004).

C. The President's Determination

On February 28, 2005, after this Court granted certiorari and while Mr. Medellín's case was pending before it, President George W. Bush issued a signed, written determination that state courts must provide review and reconsideration to the 51 Mexican nationals named in the *Avena* judgment—including Mr. Medellín—pursuant to the criteria set forth by the ICJ in the *Avena* judgment, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits. The President declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its

> international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America (Avena)*, 2004 I.C.J. 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican national addressed in that decision.

187a. The President's determination was issued on the same day that the United States filed its brief as amicus curiae in Mr. Medellín's case, and it was attached as an appendix to that brief. Brief for United States as Amicus Curiae Supporting Respondent, Feb. 28, 2005, at 8a, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) ("U.S. Fed. Br.").

In its brief in this Court, the United States explained that the President had determined that compliance with the *Avena* judgment "serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law." U.S. Fed. Br. 9. In particular, the United States observed that "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected." *Id.* at 41.

As the United States also explained, the President's determination gave Mr. Medellín the right to "file a petition in state court seeking [the] review and reconsideration [ordered in *Avena*], and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the Avena decision should be given effect by the state

court in accordance with the President's determination that the decision should be enforced under general principles of comity." *Id.* at 42. In the event that prejudice is found, "a new trial or a new sentencing would be ordered." *Id.* at 47. To the extent that state procedural default rules would prevent giving effect to the President's determination, "those rules must give way, because Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution and authorized by his power to represent the United States in the United Nations, see U.N. Charter Art. 94, constitutes 'the supreme Law of the Land.' " *Id.* at 43-44 (citations omitted). Finally, "a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention." *Id.* at 46.

D. This Court's Prior Decision

In deference to the President's determination directing claims for review and reconsideration to the state courts, Mr. Medellín filed a motion to stay his case in this Court, requesting that the case be held in abeyance while Mr. Medellín exhausted in state court his claims based on *Avena* and the President's determination—neither of which grounds had existed at the time of his first state post-conviction petition. In order to ensure compliance with any applicable statute of limitations, Mr. Medellín filed the contemplated petition for a writ of habeas corpus in the Texas Court of Criminal Appeals while his case was pending before this Court, and he asked the Texas court to hold his petition in abeyance until this Court had ruled on his motion for a stay.

On May 23, 2005, this Court decided, by a vote of 5 to 4, to dismiss the writ of certiorari as improvidently granted, in part because of the prospect of relief in Texas state court and in part because of potential obstacles to reaching the merits because of the federal habeas issues raised in the

procedural posture of the case as then before the Court. *Medellín v. Dretke*, 544 U.S. 660, 662 (2005) (*per curiam*). The Court specifically noted that direct review after a decision of the Texas Court of Criminal Appeals in Mr. Medellín's case would be a better vehicle for reaching the specific issues presented:

> Of course Medellín, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31), unencumbered by the issues that arise from the procedural posture of this action.

Id. at 664 n.1.

Justice Ginsburg concurred in the decision and, writing for herself and Justice Scalia, stated that she did so "recognizing that this Court would have jurisdiction to review the final judgment in the Texas proceedings, and at that time, to rule definitively on the Nation's obligation under the judgment of the ICJ if that should prove necessary." *Id.* at 669 (internal quotation marks omitted). Writing for herself only, Justice Ginsburg said she would have preferred to grant Mr. Medellín's motion to stay, *id.* at 668, but given the absence of a majority for that course joined the Court's dismissal, which "would leave nothing pending here, but would enable this Court ultimately to resolve, clearly and cleanly, the controlling effect of the ICJ's *Avena* judgment, shorn of procedural hindrances that pervade the instant [federal] action." *Id.* at 668-69.

Justice O'Connor dissented, joined by Justices Stevens, Souter, and Breyer, stating that rather than dismiss, she would have vacated the Fifth Circuit's denial of a certifi-

cate of appealability and remanded for further proceedings there. *Id.* at 673. Since the rights of 50 individuals apart from *Medellín* were adjudicated in the *Avena* decision, Justice O'Connor noted, "[h]is case . . . presents, and the Court in turn avoids, questions that will inevitably recur." *Id.* at 675.

Justice Souter, writing for himself, and Justice Breyer, writing for himself and Justice Stevens, also wrote dissenting opinions, in which they stated that they would have granted the stay that Mr. Medellín had sought. Justice Souter wrote that a stay "would retain federal jurisdiction and the option to act promptly, which petitioner deserves after litigating this far." *Id.* at 692. Justice Breyer noted that "several Members of this Court have confirmed that the federal questions implicated in this case are important, thereby suggesting that further review here after the Texas courts reach their own decisions may well be appropriate" and "that a loss in state court would likely be followed by a review in this Court." *Id.* at 694.

E. The Proceedings Below

Following this Court's dismissal, the Texas Court of Criminal Appeals set Mr. Medellín's habeas petition for briefing and oral argument on whether Mr. Medellín's habeas corpus application satisfied the requirements of Article 11.071, § 5, of the Texas Code of Criminal Procedure ("Section 5"). *Ex parte Medellín*, 206 S.W.3d 584 (Tex. Crim. App. 2005) (order directing briefing). Section 5 is the Texas provision governing subsequent applications by petitioners who had previously sought post-conviction relief.

Mr. Medellín argued, both in his petition and his brief, that the treaty obligation to abide by the *Avena* decision and the President's determination implementing it on his behalf are each independently binding federal law and that, by virtue of the Supremacy Clause of the United States

Constitution, they preempt any inconsistent provisions of Section 5.[2] Mr. Medellín also argued that, in any case, he satisfied the requirements of Texas law.

The United States, as *amicus curiae*, argued in support of granting Mr. Medellín review and reconsideration of his conviction and sentence on the ground that the President had determined that that action was necessary in order for the United States to comply with its treaty obligations. The United States also argued that federal law would preempt Section 5 in Mr. Medellín's case because application of Section 5 to bar Mr. Medellín's petition would contravene the President's implementation of treaty obligations, authorized by federal statute, as well as his foreign affairs authority under Article II of the United States Constitution. Brief for United States as Amicus Curiae, Sept. 2, 2005, at 49-50 ("U.S. CCA Br.").

On September 14, 2005, the Court of Criminal Appeals heard oral argument from Mr. Medellín, the State of Texas, and the United States. On November 15, 2006, the Court of Criminal Appeals dismissed Mr. Medellín's application, holding that the application did not satisfy Section 5 and

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[2] *See* Subsequent Application for Post-Conviction Writ of Habeas Corpus, Mar. 24, 2005, at 3 ("Subseq. Appl.") ("President Bush's determination and the *Avena* Judgment constitute two separate sources of binding federal law. As discussed below, Texas law expressly permits this Court to give full effect to the President's determination and the *Avena* Judgment. But if Texas law were read to prevent this Court from doing so, it would be preempted."); *see also id.* at 13-24; Brief of Applicant, July 29, 2005 at 1-2 ("Appl't Br.") ("In the event that the Court determines for any reason that those requirements are not met, or that any other provision, rule, or doctrine of Texas law would bar Mr. Medellín from receiving the review and reconsideration that first the ICJ and now the President have ordered, this Court would also have to decide whether Texas courts must in any event give effect to the *Avena* Judgment and the President's Determination, as a matter of federal preemption of state law under the Supremacy Clause of Article VI of the United States Constitution."); *see also id.* at 36-52.

that neither the President's determination nor *Avena* preempts that provision of state law. 1a.

With respect to the President's determination, the Texas court was divided, with no single rationale commanding a majority. Judge Keasler, joined by Judges Meyers, Price, and Hervey, found that the President "exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with *Avena*." 45a. Specifically, Judge Keasler wrote: "We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary . . . the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law." 30a. Judge Keasler went on to state that "it is evident that the President's independent power to settle a dispute with a foreign nation, recognized throughout the nation's history, depends on the existence of an executive agreement," and that "[g]iven the extraordinary conduct of the President, unsupported by a history of congressional acquiescence, we find that the President's chosen method for resolving this Country's dispute with Mexico is 'incompatible with the . . . implied will of Congress.' " 44a-45a (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring)). Accordingly, Judge Keasler found, the President's determination constitutes an "unprecedented unilateral action,' " which taken in the absence of an executive agreement, renders "the exercise of the President's foreign affairs power '. . . at its lowest ebb'." *Id.* After considering the statutes and treaties cited by Mr. Medellín and the United States, Judge Keasler concluded that:

> The President's Memorandum . . . cannot be sustained under the express or implied constitutional powers of the President relied on by Medellín and the United States or under any power granted to the President by an act of Congress cited by Medellín and the United States. As such, the President has violated the

> separation of powers doctrine by intruding into the domain of the judiciary, and therefore, Medellín cannot show that the President's memorandum preempts Section 5.

55a.

Judge Womack concurred in the result without opinion. 64a. Presiding Judge Keller delivered an opinion concurring in the judgment, stating that because of the state interests involved, the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution," 71a, and suggesting that, at a minimum, a new treaty would be required to give effect to the *Avena* judgment, 68a-69a. Judge Cochran, writing for herself and Judges Johnson and Holcomb, found that the President's determination was without effect because it was not written in a "manner prescribed for Presidential Proclamations or Executive Orders," but rather appeared to be "written in a private memo style." 78a-79a.

With respect to the *Avena* judgment, Judge Keasler wrote on behalf of a majority, and held that Mr. Medellín's claim was foreclosed by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), which, the Texas court found, interpreted the Vienna Convention in a manner inconsistent with the *Avena* judgment. 20a. The court concluded that "[i]n this case, we are bound by the Supreme Court's determination that ICJ decisions are not binding on United States courts." 24a. The Texas court did not explicitly address whether the *Avena* judgment—whether right or wrong in the view of the U.S. courts—would still be binding in the cases of the 51 Mexican nationals, including Mr. Medellín, whose cases, unlike that of the defendants in *Sanchez-Llamas*, the ICJ adjudicated. Mr. Medellín had expressly argued that the *Avena* judgment was directly binding as a matter of treaty

in his case, as he was one of the Mexican nationals whose rights were adjudicated in that judgment,[3] but the Texas court apparently failed to perceive the difference between his case and the two cases decided in *Sanchez-Llamas*.

Having found that neither the President's determination nor the *Avena* judgment constitutes binding federal law, the Court of Criminal Appeals concluded that they could not preempt Section 5. The court then went on to interpret Section 5 as barring Mr. Medellín's petition, and on that basis, dismissed the petition. 63a-64a.[4]

Mr. Medellín now seeks review in this Court, as contemplated by this Court's prior decision in his case. *See Medellín v. Dretke*, 544 U.S. at 664 n.1.

REASONS FOR GRANTING THE WRIT

In this case, the Texas Court of Criminal Appeals has expressly challenged the authority of the federal govern-

[3] Subseq. Appl. 22 ("Mr. Medellín was one of the nationals whose rights were adjudicated by the ICJ, so the *Avena* Judgment is a binding adjudication in Mr. Medellín's own case."); *see also id.* at 20-23; Appl't Br. 42 ("[T]he courts of the United States and the several states are obliged to comply with the *Avena* judgment by treating the judgment as conclusive of the rights of Mr. Medellín and the other Mexican nationals whose rights were adjudicated in *Avena*."); *see also id.* at 36, 41-43, 51.

[4] On November 21, 2006, following the decision in the Texas Court of Criminal Appeals and in order to ensure that his claims were preserved under any applicable statute of limitations, Mr. Medellín filed a federal habeas petition in the United States District Court for the Southern District of Texas seeking relief based on the *Avena* judgment and the President's determination. *Medellín v. Quarterman*, No. 4:06cv3688. He simultaneously asked the District Court to hold his petition in abeyance pending this Court's disposition of a petition for certiorari to review the judgment of the Texas Court of Criminal Appeals. By order dated January 8, 2007, that court noted Mr. Medellín's request to hold the case in abeyance, but directed Texas to respond to the petition.

ment, in the person of the President of the United States, to conduct the foreign relations of the United States by determining whether the United States would comply with the decision of an international court in a case to which it was a party. That Court has done so, moreover, in a case in which the President has exercised his foreign affairs authority to determine only that the United States would comply with treaty obligations to which the President, with the advice and consent of the Senate, had earlier committed this country. Hence, if left unreviewed, the Texas court's decision would result in the execution of a foreign national by a process that defied the federal government's paramount authority in the matter of our international relations.

To ensure "uniformity in this country's dealings with foreign nations," it is imperative that state authorities respect the Constitution's allocation of the foreign affairs power to the federal government, and specifically to the President. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). To ensure the United States' effectiveness in world affairs, it is imperative that the international community understand that when the United States gives its word, as it did in the UN Charter, the ICJ Statute, and the Optional Protocol, the United States will keep its word. Especially in a case involving capital punishment, this Court cannot stand by when the Texas Court of Criminal Appeals tells the world otherwise.

I. The Court Should Grant the Writ Because the Texas Court of Criminal Appeals Has Challenged the President's Constitutional and Statutory Authority to Conduct the Nation's Foreign Affairs.

It is fundamental that the federal government—not the individual states—is responsible for the conduct of this nation's relations with foreign powers. The President, together with his subordinates in the executive branch,

speaks for the United States in these relations. In this case, however, the Texas Court of Criminal Appeals has declared invalid an exercise of the federal foreign affairs power by the President. That decision cannot be allowed to stand unreviewed.

In his February 2005 determination, the President made clear that his determination to "discharge [the] international obligations" of the United States by giving effect to the *Avena* judgment was made "pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America." 187a. As the United States has explained, this determination reflects the President's decision "that the foreign policy interests of the United States in meeting its international obligations and in protecting Americans abroad justify compliance with the ICJ's decision." U.S. CCA Br. 21; *accord* U.S. Fed. Br. 41, 48.

The state court, however, held that the President of the United States had no authority to act in this manner. The plurality opinion by Judge Keasler concluded that, in issuing his determination, "the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary." 30a. The plurality recognized that "[t]he President's independent foreign affairs power to enter into an executive agreement to settle a dispute with a foreign nation under Article II of the Constitution" was well established. 43a. It nonetheless concluded, however, that the President did not have authority to direct compliance with the result of an existing dispute resolution mechanism—even though that mechanism had been established by treaties ratified by the President with the advice and consent of the Senate. 45a. Presiding Judge Keller, concurring, would have gone even further, suggesting that a new treaty would be required before the states must abide by the result of the mechanism set up by the Optional Protocol to the Vienna Convention. 68a.

Notwithstanding the Texas plurality's characterization of the issue as one of "separation of powers," this case squarely presents an issue of federalism—specifically, the paramount authority of the federal government in matters of international relations. As this Court has made clear, "[i]n our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states." *United States v. Pink*, 315 U.S. 203, 242 (1942).[5] Review of the state court's decision in this case, which refuses to enforce an exercise of federal foreign affairs authority, is necessary to give effect to the constitutional "concern for uniformity in this country's dealings with foreign nations." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). Allowing the Texas state court to have the last word—or courts of the various states to have several potentially inconsistent last words—on the enforcement of the President's determination that the United States will abide by its treaty obligations would gravely compromise the nation's "capacity . . . to speak . . . with one voice in dealing with other governments." *Id.* at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

Under the Constitution, it is the President who acts as the voice of the United States in its dealings with foreign governments. By vesting "[t]he executive Power . . . in a

[5] *See also, e.g., Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." (internal quotation omitted)); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

President of the United States of America," U.S. CONST. art. II, § 1, and granting the President the power to make treaties and appoint and receive ambassadors and consuls, *id.*, §§ 2-3, the Constitution extends to the President, as the "Head of State," authority to act as "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). This constitutional power of the President includes the "independent authority" to formulate and execute foreign policy even without authorization by statute or treaty. *Garamendi*, 539 U.S. at 414; *accord Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). Thus, for example, the President has the power to enter into executive agreements with foreign governments requiring no ratification by the Senate or approval by Congress. *United States v. Belmont*, 301 U.S. 324, 331 (1937). His actions carry an even greater presumption of validity when carried out with "express or implied authorization from Congress." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (citing *Youngstown*, 343 U.S. at 637 n.2 (Jackson, J., concurring)).[6]

The Texas plurality, however, held that the President exceeded his authority by determining that the United States would comply with the *Avena* judgment without seeking a new agreement with Mexico that it would do so. That holding fails to recognize that the United States, by

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[6] *See also, e.g., Garamendi*, 539 U.S. at 414 ("the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations' "; "there is executive authority to decide what [foreign relations policy] should be"); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (the President has the "lead role . . . in foreign policy"); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.").

treaties duly ratified by the President and Senate, has *already* agreed with Mexico that it would abide by the outcome of the ICJ's decisions in cases arising under the Vienna Convention. *See* UN Charter, art. 94(1); ICJ Statute, arts. 59-60; Optional Protocol, art. I. The Texas plurality's view would allow the President to create new obligations under executive agreements, but deny him the authority to give effect to existing international obligations under ratified treaties—which, if anything, have greater constitutional dignity than executive agreements. In effect, the Texas plurality ruled that that the President of the United States must ask Mexico's permission before he may act to ensure the United States' compliance with its international commitments.

For the same reasons, the suggestion in Presiding Judge Keller's concurrence that the President is required to conclude a new treaty with Mexico, with the advice and consent of the Senate, is equally pointless. Again, the President, with the advice and consent of the Senate, has *already* entered into treaties with Mexico committing the United States to comply with the *Avena* judgment. Surely the Constitution is not so dysfunctional as to leave the federal government powerless to execute the obligations that the President and Senate have duly undertaken in the exercise of their constitutional authority. As this Court has held, "[w]ithin the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate." *Belmont*, 301 U.S. at 331-32.

Hence, if anything, this is a far easier case than this Court's cases holding state law preempted by an executive agreement. *See, e.g., Garamendi*, 539 U.S. at 416, 420; *Dames & Moore*, 453 U.S. at 686; *Belmont*, 301 U.S. at 330-32. In this case, the United States entered into treaties ratified by the President and Senate—which the Constitution declares to be the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2—and the President has simply deter-

mined that the United States will abide by its obligations under those treaties. If the President's authority in international affairs includes the authority to conclude new agreements without Senate approval, then surely it includes the authority to ensure that the United States complies with existing obligations to foreign nations under treaties already ratified with the advice and consent of the Senate. *See, e.g.*, U.S. CONST. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed").

Moreover, as the United States as *amicus curiae* pointed out before the Texas court, Congress has authorized the President to "use such means . . . as he may think proper" to obtain the release of U.S. citizens detained abroad. 22 U.S.C. § 1732; *see* U.S. CCA Br. 23. As well, Congress has authorized the Secretary of State, an Executive Branch officer under the President's direction, to make provision for the "protection of . . . foreign persons in the United States, as authorized by law." 22 U.S.C. § 4802(a)(1)(D). Congress also has recognized the President's broad control over the United States' relations with organs of the United Nations by empowering him, among other things, to direct the actions of the United States before those bodies. *See* 22 U.S.C. § 287(a), 287a; U.S. CCA Br. 28. The Texas court's decision directly thwarts the actions of the Executive Branch in carrying out these statutory missions. *See, e.g., Garamendi*, 539 U.S. at 420 ("the likelihood that state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government" is sufficient for preemption).

Finally, contrary to Judge Cochran's opinion concurring in the judgment, the fact that the President's determination is captioned as a memorandum to the Attorney General does not provide a basis for refusing to give it effect. 78a-79a. The legal effect of a presidential directive depends on its substance, not on the form in which it was issued. *Wolsey v. Chapman*, 101 U.S. 755, 770 (1880). Indeed, in

the foreign policy arena, this Court has not required any particular formalities before state law can be preempted. For example, in *Belmont*, the Court identified a preemptive executive agreement from an exchange of diplomatic correspondence, *see* 310 U.S. at 326, and in *Garamendi*, the Court identified a preemptive foreign policy from executive officials' testimony before congressional committees, *see* 539 U.S. at 421-23 (summarizing the testimony); *id.* at 427 (finding the testimony "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives" (internal quotation marks omitted)).

In this case, there can be no doubt that the President acted to require compliance with *Avena* in the cases of the 51 Mexican nationals, because he expressly and publicly said that that was what he was doing. 187a. The President addressed his determination to the Attorney General, who is responsible for representing the United States in the courts where the *Avena* judgment would be at issue. That determination constituted federal law, and the Texas Court of Criminal Appeals had a constitutional obligation to give it effect. U.S. CONST. art. VI, cl. 2.

Particularly in a case as closely watched as this one, failure to review the state court's direct challenge to Presidential authority would call into question the very ability of the federal government to make good on the promises the United States makes to its treaty partners. Not only would this place further strain on the relationship between the United States and Mexico, but it also would inevitably impair the credibility and bargaining power of the United States in future diplomatic negotiations with any foreign country. If the President is unable to guarantee that the fifty states will respect the nation's promises in regard to the treatment of foreign nationals in this country, foreign nations will understandably be wary of making promises to the United States in regard to the treatment of American

citizens and companies abroad or, for that matter, on any other subject.

II. The Court Should Grant the Writ Because the Texas Court of Criminal Appeals Has Placed the United States in Breach of Undisputed Treaty Obligations.

The Framers provided for review of treaty questions by "one supreme tribunal" in order to ensure that state courts do not bring the United States into disputes with foreign nations over obligations undertaken by the federal government. THE FEDERALIST No. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed. 1961). There can be no dispute that, if left uncorrected, the Texas court's decision will place the United States in breach of its international legal obligation to give review and reconsideration to the 51 Mexican nationals whose rights were adjudicated in *Avena*. That prospect alone requires this Court's review.

At the time of the *Avena* case, the United States was a party to the Optional Protocol, which gave the ICJ jurisdiction to adjudicate the case that Mexico brought against the United States over the interpretation and application of the Vienna Convention. The United States appeared before the ICJ and vigorously litigated the case. By the terms of the United Nations Charter—a treaty ratified by the President with the advice and consent of the Senate—the United States "undert[ook] to comply with the decision of the International Court of Justice in any case to which it is a party." UN Charter, art. 94(1); *see also* ICJ Statute, art. 59 ("The decision of the Court has no binding force *except between the parties and in respect of that particular case*") (emphasis added); *id.* art. 60 (ICJ judgments are "final and without appeal"). Indeed, even without these provisions, an agreement between two nations to submit a dispute to an international body for decision necessarily implies an agreement to abide by the result. *La Abra Silver Mining*

Co. v. United States, 175 U.S. 423, 463 (1899); *cf. Smith v. Morse*, 76 U.S. (9 Wall.) 76, 82 (1870). Under international law, this obligation applies to all branches of the United States federal government and to all branches of the government of its constituent states, including the judiciary.[7]

In fact, none of the participants in this case disputes this international obligation of the United States to Mexico. Mr. Medellín has unequivocally called upon the courts of this country to ensure that United States fulfills its treaty obligation to comply with *Avena*. Unsurprisingly, Mexico, too, has insisted that the United States has an obligation to comply with *Avena* and called upon the United States to fulfill it. *See* Br. Amicus Curiae of United Mexican States in Supp. of Jose Ernesto Medellín, July 29, 2005, at 28-29, *Ex parte Medellín*, No. AP-75,207 (Tex. Crim. App. Nov. 15, 2006); *accord* Br. Amicus Curiae of Gov't of United Mexican States in Supp. of Pet'r at 28-29, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). The State of Texas also acknowledges the obligation of the United States to comply. *See* Respondent's Brief, Feb. 28, 2005, at 34, *Medellín v. Dretke*, 544 U.S. 660. The Texas court did not question the obligation. *See, e.g.*, 12a-13a. And the United

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[7] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 cmt. b (1987) (federal state is responsible for failure of constituent units to comply with treaty); ARTICLES ON STATE RESPONSIBILITY, art. 4 (International Law Commission, draft adopted 2001) ("The conduct of any State organ shall be considered an act of that State under international law . . . whatever its character as an organ of the central government or of a territorial unit of the State."); Counter-Memorial of United States of America, Mar. 30, 2001, at 127, in *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 ("The United States accepts the Tribunal's ruling that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State.") (internal quotation omitted), *available at* http://www.state.gov/documents/organization/7387.pdf.

States, acting through the President, has concluded both that it has an obligation to comply and that it is in the paramount interest of the country to do so. 187a; U.S. CCA Br. 16; U.S. Fed. Br. 41.

Even in the absence of the President's determination, the treaty obligation to comply with the *Avena* decision would independently bind the state courts, because "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]" U.S. CONST. art. VI, cl. 2. To be sure, some treaties—for example, those calling for the appropriation of money—may call for legislative rather than judicial action. *See* Louis Henkin, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 203 (1996). However, this Court has held that whenever the provisions of a treaty "prescribe a rule by which the rights of the private citizen or subject may be determined," a federal or state court in the United States must "resort[ ] to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884). Here, the treaty obligation to give effect to the *Avena* judgment relates to individual rights in the criminal process, and the state judicial authorities are necessarily the ones who are in a position to give them effect. Hence, the President's determination reinforced an obligation that the Constitution imposed on state courts in any event.

In *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), this Court disagreed with the interpretation that the ICJ gave to the Vienna Convention in *Avena*. However, the Court did not have before it—and thus had no occasion to consider—the effect of the *Avena* judgment and the President's determination on the cases of the 51 Mexican nationals who were named in that judgment and whose rights were expressly adjudicated there. Like any final judgment or award, the *Avena* judgment is binding on the parties regardless of the underlying merits. *See, e.g., Hilton v.*

Guyot, 159 U.S. 113, 203 (1895) ("[T]he merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact."). In other words, regardless of whether the *Avena* judgment correctly states principles of law applicable to other foreign nationals' cases under the Vienna Convention, it remains binding by treaty "between the parties and in respect of that particular case." ICJ Statute art. 59.

The fear that the state courts might render ineffectual the federal government's efforts to comply with treaties—and that very experience under the Articles of Confederation—is precisely the reason that the Constitution makes treaties binding on state courts under the Supremacy Clause of Article VI and places them within the federal judicial power in Article III, § 2.[8] As Alexander Hamilton argued in support of the Constitution, "the peace of the whole [nation] ought not to be left at the disposal of a part. The union will undoubtedly be answerable to foreign powers for the conduct of its members." THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961), *quoted in Crosby*, 530 U.S. at 381 n.16. This Court cannot allow the Texas court to violate a commitment made by the elected representatives of the American people as a whole.

III. The Court Should Grant the Writ Because Review Now, in This Case, Is the Only Way to Vindicate the Interests at Stake.

The time to decide the questions presented is now. This Court dismissed certiorari in Mr. Medellín's prior case precisely because of the "multiple hindrances" to reaching the

[8] *See, e.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (opinion of Chase, J.); *id.* at 276-77 (opinion of Iredell, J.); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand rev. ed. 1966); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1102-49 (2000).

merits of Mr. Medellín's case on federal habeas proceedings rather than on direct review from the state court. *Medellín v. Dretke*, 544 U.S. at 666. The Court noted that it was dismissing the petition "in light of the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President's memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellín's pending action." *Id.* The Texas Court of Criminal Appeals has heard and decided Mr. Medellín's case, and it has denied him relief. Ten other Mexican nationals whose rights were adjudicated in *Avena* have petitions pending before that Court,[9] and but for intervention by this Court, those petitions would presumably meet the same fate as Mr. Medellín's.

Mr. Medellín now returns to this Court. If this Court were to deny review and Mr. Medellín were to pursue a new federal habeas action, the same obstacles—and perhaps others—could hinder the ability of the federal courts to grant effective relief. The President apparently recognized as much when he indicated that the state courts were the appropriate forum for the review and reconsideration that the *Avena* judgment requires. 187a. In accordance with the Court's reasoning in dismissing the earlier writ, it should hear Mr. Medellín's case now.

Nor is there any reason to wait for courts from other states to decide the issue. Both the treaty obligation to abide by the *Avena* judgment and the Presidential deter-

[9] *Ex parte Cesar Roberto Fierro*, No. WR-17,425-05; *Ex parte Ignacio Gomez*, No. WR-52,166-02; *Ex parte Ramiro Rubi Ibarra*, No. WR-48,832-03; *Ex parte Humberto Leal Garcia*, No. WR-41,743-02; *Ex parte Virgilio Maldonado*, No. WR-51,612-03; *Ex parte Roberto Moreno Ramos*, No. WR-35,938-02; *Ex parte Daniel Angel Plata*, No. WR-46,749-03; *Ex parte Ruben Ramirez Cardenas*, No. WR-48,728-02; *Ex parte Felix Rocha Diaz*, No. WR-52,515-03; *Ex parte Edgar Tamayo*, No. WR-55,690-03.

mination to comply with that obligation constitute federal law, and every state court in the United States has a constitutional obligation to give them effect. To treat some of the 51 Mexican nationals covered in *Avena* differently based on the states in which their cases arose would not only be fundamentally inhumane in capital cases, but it would directly undermine the treatymaking authority of the President and Senate and the ability of the President to speak for the country in matters of international relations.

In any event, the decision of the Texas court already conflicts with the decision of the Oklahoma Court of Criminal Appeals in *Torres v. State*, 2005 OK CR 17, 120 P.3d 1184 (Okla. Crim. App. 2005). In *Torres*, even before the President's determination, the Oklahoma court granted review and reconsideration, consistent with the *Avena* judgment, of the conviction and sentence of one of the 51 Mexican nationals named therein. *See id.* ¶ 7, 120 P.3d at 1187-88. The Texas court held that no such review was required even in the face of the President's determination that the United States would comply with *Avena*. Thus, this case represents a conflict on a question of federal law between the courts of last resort of two states.

While the death penalty itself is not at issue in this case, the status of this case as a capital case makes the need to grant the writ all the more compelling. If there is any case in which this Court should not send a message to friends and allies that the United States is indifferent to its treaty commitments, it is this one, in which the Court would send at the same time a message that the United States is indifferent to human life.

CONCLUSION

For all these reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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January 16, 2007

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COURT OF CRIMINAL APPEALS OF TEXAS

No. AP-75207
November 15, 2006

EX PARTE JOSÉ ERNESTO MEDELLÍN,

Applicant.

OPINION

KEASLER, J., delivered the opinion of the Court with respect to Parts I, II, III.A., III.C., and IV, in which KELLER, P.J., MEYERS, PRICE, JOHNSON, HERVEY, HOLCOMB, and COCHRAN, JJ., joined, and an opinion with respect to Part III.B., in which MEYERS, PRICE, and HERVEY, JJ., joined.

José Ernesto Medellín filed this subsequent application, alleging that the International Court of Justice *Avena* decision and the President's memorandum directing state courts to give effect to *Avena*, require this Court to reconsider his Article 36 Vienna Convention claim because they (1) constitute binding federal law that preempt Section 5, Article 11.071 and (2) were previously unavailable factual and legal bases under Section 5(a)(1). We hold that *Avena* and the President's memorandum do not preempt Section 5 and do not qualify as previously unavailable factual or legal bases.

I. PROCEDURAL HISTORY OF MEDELLÍN'S CASE

Medellín, a Mexican national, was convicted of capital murder and sentenced to death for his participation in the gang rape and murder of two teenage girls in Houston. We affirmed his conviction and sentence on direct appeal.[1]

Medellín filed an initial application for a writ of habeas corpus, claiming for the first time, among other things, that his rights under Article 36 of the Vienna Convention had been violated because he had not been advised of his right to contact the Mexican consular official after he was arrested.[2] The district court found that Medellín failed to object to the violation of his Vienna Convention rights at trial and, as a result, concluded that his claim was procedurally barred from review. The court also found, in the alternative, that Medellín, as a private individual, did not have standing to bring a claim under the Vienna Convention because it is a treaty among nations and therefore does not confer enforceable rights on individuals; only signatory nations have standing to raise a claim under the treaty. Offering an additional alternative, the court determined that Medellín failed to show harm because he received effective legal representation and his constitutional rights had been safeguarded. Finally, the court concluded that Medellín did not prove that his rights under the Fifth, Sixth, and Fourteenth Amendments had been violated and that he failed to show that any non-notification affected the validity of his conviction and sentence. We adopted the

[1] *Medellín v. State*, No. AP-71,997, slip op. (Tex.Crim.App. Mar. 19, 1997) (not designated for publication).

[2] *Ex parte Medellín*, No. 675430-A (339th Dist.Ct. Jan. 22, 2001).

trial court's findings of fact and conclusions of law with written order and denied relief.[3]

Medellín then presented his Vienna Convention claim in a federal petition for a writ of habeas corpus. The district court denied relief,[4] and Medellín filed for a certificate of appealability. While his application was pending, the International Court of Justice (ICJ) issued its decision in *Avena*.[5] In that case, Mexico claimed that the United States had violated the Vienna Convention by failing to timely advise more than fifty Mexican nationals awaiting execution in United States prisons, including Medellín, of their right to talk to a consular official after they had been detained.[6] The ICJ ruled in favor of Mexico, holding that the Vienna Convention does confer individual rights and that the United States violated the Convention.[7] To remedy the violation, the ICJ ordered the United States to provide review and reconsideration of the convictions and sentences[8] at issue to determine whether the violation "caused actual prejudice to the defendant in the process of administration of criminal justice."[9] The ICJ specifically stated that review is required regardless of procedural default rules that would otherwise bar review.[10]

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[3] *Ex parte Medellín*, No. WR-50,191-01 (Tex.Crim.App. Oct. 3, 2001) (not designated for publication).

[4] *Medellín v. Cockrell*, Civ. No. H-01-4078 (S.D.Tex. Apr. 17, 2003).

[5] *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31).

[6] *Id.* ¶¶ 13-16, 49.

[7] *Id.* ¶¶ 90, 106, 140.

[8] *Id.* ¶¶ 138-40.

[9] *Id.* ¶ 121.

[10] *Id.* ¶¶ 112-13, 153(9), (11).

The federal district court denied Medellín's application for a certificate of appealability, and Medellín appealed to the United States Court of Appeals for the Fifth Circuit, which also denied his application.[11] The Fifth Circuit noted the ICJ decision in *Avena*, but determined that it was bound by the Supreme Court's decision in *Breard v. Greene*, which held that claims based on a violation of the Vienna Convention are subject to procedural default rules.[12] Continuing, the court found that even if Medellín's Vienna Convention claim was not procedurally defaulted, its previous holding in *United States v. Jimenez-Nava*—that the Vienna Convention does not create individually enforceable rights—would require it to deny Medellín's application for a certificate of appealability.[13]

Medellín petitioned for certiorari to the Supreme Court of the United States, which granted review.[14] Before oral argument, the President issued a memorandum directing state courts to give effect to the *Avena* decision under the principles of comity.[15] Then, while his case was pending before the Supreme Court, Medellín filed an application for a writ of habeas corpus in this

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[11] *Medellín v. Dretke*, 371 F.3d 270, 273, 281 (5th Cir.2004).

[12] *Id.* at 280 (citing *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998)).

[13] *Id.* (citing *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.2001)).

[14] *Medellín v. Dretke*, 543 U.S. 1032, 125 S.Ct. 686, 160 L.Ed.2d 518 (2004).

[15] President's Memorandum for the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html [hereinafter Presidential Memorandum].

Court, requesting that we give full effect to the *Avena* decision and to the President's memorandum.[16] The Supreme Court subsequently dismissed Medellín's case as improvidently granted, stating that there is a possibility that "Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum. . . ."[17]

Based on the Supreme Court's dismissal, we determined that Medellín's subsequent application is ripe for consideration.[18] We therefore filed and set this case for submission.

Under Article 11.071, Section 5(a) of the Code of Criminal Procedure, we may not consider the merits of any claims raised on a subsequent application for a writ of habeas corpus or grant relief unless the applicant provides sufficient specific facts demonstrating that:

- "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application";[19]
- "by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt";[20] or

16 *Ex parte Medellín*, Application No. AP-75,207.

17 *Medellín v. Dretke*, 544 U.S. 660, 125 S.Ct. 2088, 2092, 161 L.Ed.2d 982 (2005) (per curiam).

18 *Ex parte Medellín*, No. AP-75,207 (per curiam order) (designated for publication).

19 Tex.Code Crim. Proc. art. 11.071 § 5(a)(1) (Vernon 2003).

20 *Id.* § 5(a)(2).

- "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the State's favor one or more of the special issues. . . ."[21]

We ordered Medellín and the State to brief the following issue: whether Medellín "meets the requirements for consideration of a subsequent application for writ of habeas corpus under the provisions of Article 11.071, section 5, of the Texas Code of Criminal Procedure."[22] We also invited the Attorney General of the United States to "present the views of the United States."[23] On September 14, 2005, we heard oral argument from the parties and the Solicitor General, who argued on behalf of the Attorney General of the United States. Medellín's claims raise many remarkable issues of first impression for this Court to resolve. Before we provide some necessary background information, we begin with a brief overview of the arguments advanced by the parties and the United States as *amicus curiae*.

Medellín argues that the *Avena* decision and the President's memorandum are binding federal law that preempt Section 5 under the Supremacy Clause of the United States Constitution.[24] Alternatively, contending that he meets the requirements of Section 5(a)(1), Medellín claims that the *Avena* decision and the President's memorandum are previously unavailable factual and legal bases because neither was available when he filed his

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[21] *Id.* § 5(a)(3).

[22] *Ex parte Medellín*, No. AP-75,207 (per curiam order) (designated for publication).

[23] *Id.*; *see* 28 C.F.R. § 0.5 (2005).

[24] Br. of Applicant at 26-27.

first application.[25] Countering Medellín's arguments, the State contends that the *Avena* decision and the President's memorandum do not meet the requirements of Section 5 and do not override it.[26] Finally, the United States as *amicus curiae* asserts that, although *Avena* is not enforceable in United States courts, Medellín is entitled to review and reconsideration of the merits of his Vienna Convention claim "to the extent that his claim relies on the President's determination that 'review and reconsideration' . . . by Texas courts is necessary for compliance with the United States' international obligations."[27] The United States also avers that "Section 5 would contravene the President's implementation of treaty obligations, and federal law would preempt its operation in the circumstances of this case."[28]

II. CONTEXTUAL BACKGROUND

A. Treaties

Treaties are compacts between sovereign nations.[29] In the international arena, compliance with a treaty depends

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[25] *Id.* at 52-53.

[26] Br. of Respondent at 20-21.

[27] Br. of United States as *Amicus Curiae* at 12.

[28] *Id.* at 15.

[29] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 81 L.Ed. 255 (1936) ("operations of the nation in such [foreign] territory must be governed by treaties, international understandings and compacts, and the principles of international law."); *Santovincenzo v. Egan*, 284 U.S. 30, 40, 52 S.Ct. 81, 76 L.Ed. 151 (1931); *B. Altman & Co. v. United States*, 224 U.S. 583, 600, 32 S.Ct. 593, 56 L.Ed. 894 (1912); *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884); *Rocha v. State*, 16 S.W.3d 1, 15-16 (Tex.Crim.App.2000).

upon "the interest and the honor" of the treaty's member nations.[30] When a member nation violates a treaty, another member nation cannot obtain redress from the judicial body of the violating nation but may seek enforcement through "international negotiations and reclamations."[31]

Treaties, entered into by the President of the United States with the consent of a super-majority of the United States Senate,[32] are incorporated into the domestic law of our country pursuant to the Supremacy Clause of the United States Constitution, which commands: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any

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30 *Head Money Cases*, 112 U.S. at 598.

31 *Id.*; *see also Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888) ("If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress."); *Baldwin v. Franks*, 120 U.S. 678, 702-03 (1887) (Field, J., dissenting) (when a treaty between the United States and another county is considered as a compact between nations, as opposed to the law of the land, a violation of the treaty is a matter "to be settled by negotiation between the executive departments of the two governments, each government being at liberty to take such measures for redress as it may deem advisable."); *Foster v. Neilson*, 27 U.S. 253, 307, 2 Pet. 253, 7 L.Ed. 415 (1829) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established.").

32 U.S. Const. art. II, § 2, cl. 2; *see also B. Altman & Co.*, 224 U.S. at 600; *De Lima v. Bidwell*, 182 U.S. 1, 194, 21 S.Ct. 743, 45 L.Ed. 1041 (1901).

State to the Contrary notwithstanding."[33] Treaties are "placed on the same footing" as legislation enacted by the United States Congress, and while neither is superior to the other,[34] both are subject to the United States Constitution.[35] In describing the relationship between treaties and acts of Congress, the Supreme Court explained the difference between treaties that do not contain self-executing provisions and those that do:

> When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether.[36]

When a self-executing treaty and an act of Congress concern the same subject matter, courts should give effect to both unless the language of one would be vio-

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[33] U.S. Const. art. VI, cl. 2; *see also Head Money Cases*, 112 U.S. at 598.

[34] *Whitney*, 124 U.S. at 194.

[35] *Reid v. Covert*, 354 U.S. 1, 17, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion); *Geofroy v. Riggs*, 133 U.S. 258, 267, 10 S.Ct. 295, 33 L.Ed. 642 (1890); *Cherokee Tobacco*, 11 Wall. 616, 78 U.S. 616, 620, 20 L.Ed. 227 (1871) ("a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."); *Rocha*, 16 S.W.3d at n. 12.

[36] *Whitney*, 124 U.S. at 194; *see also Sanchez-Llamas v. Oregon*, 126 S.Ct. 2680 (2006); *Head Money Cases*, 112 U.S. at 599.

lated.[37] But when "the two are inconsistent, the one last in date will control the other."[38]

Addressing the relationship between state law and treaties, the Supreme Court has stated: "[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."[39] Accordingly, "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement."[40]

The Supreme Court has recognized that a treaty may contain certain provisions that grant judicially enforceable rights to a foreign national residing in another country.[41] In such cases, under the Supremacy Clause, the provisions of the treaty are placed in the "same category as other laws of Congress" and therefore, are "subject to such acts as Congress may pass for its enforcement, modification, or repeal."[42] When a treaty confers rights that are judicially enforceable, a court will look "to the treaty for a rule of decision for the case before it as it would to a statute."[43] However, as we recently noted, there is a presumption that " 'international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause

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37 *Whitney*, 124 U.S. at 194.

38 *Id.*

39 *United States v. Pink*, 315 U.S. 203, 230, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

40 *Id.* at 230-31.

41 *Head Money Cases*, 112 U.S. at 598.

42 *Id.* at 599.

43 *Id.*

of action in domestic courts.' "[44] Numerous federal circuit courts of appeals have also acknowledged this presumption, finding that treaty rights belong to the member nations only,[45] and therefore, may be enforced only through international political and diplomatic channels.

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[44] *Sorto v. State*, 173 S.W.3d 469, 478 (Tex.Crim.App.2005) (quoting Restatement (Third) of Foreign Relations Law of the United States § 907 *cmt. a*, at 395 (1987) and citing *Hamdan v. Rumsfeld*, 415 F.3d 33, 38-40 (D.C.Cir.2005), *overruled on other grounds by* ___ U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006)); *see also Hinojosa v. State*, 4 S.W.3d 240, 252 (Tex.Crim.App.1999) ("Generally, individuals do not have standing to bring suit based on an international treaty when sovereign nations are not involved in the dispute.").

[45] *Sorto*, 173 S.W.3d at 478 n. 31 (citing *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir.2001); *United States v. Li*, 206 F.3d 56, 67 (1st Cir.2000) (Selya & Boudin, JJ., concurring); *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.1975); *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir.1986)); *see also United States v. Emueghunam*, 268 F.3d 377, 389 (6th Cir.2001) ("courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them."); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir.1997) ("Because treaties are agreements between nations, individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty or an action brought by a signatory nation."); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir.1992) ("International treaties are not presumed to create rights that are privately enforceable."); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved."). *But see Sanchez-Llamas*, 126 S.Ct. at 2697 (Breyer, J., dissenting) (stating "no such presumption exists.").

B. The United Nations Charter and the Statute of the International Court of Justice

The United Nations was formed when its Charter, drafted in San Francisco at the United Nations Conference on International Organization, was ratified by the United States, the Republic of China, France, the Union of Soviet Socialist Republics, Great Britain, Northern Ireland, and a majority of other signatory nations.[46] With respect to the United States, the Charter entered into force on October 24, 1945. Article 92 establishes the ICJ as "the principal judicial organ of the United Nations."[47] The ICJ operates "in accordance with the annexed Statute [of the ICJ]. . . ."[48] Under Article 93, "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."[49] The Statute of the ICJ establishes, among other things, the court's organization, competence (which includes its jurisdiction), and procedures.[50] Article 34 of the Statute provides that "[o]nly states may be parties in cases before the [ICJ]" and, under Article 36(1), the court has jurisdiction over "cases which the parties refer to it and all matters specifically provided for . . . in treaties and conventions in force."[51] Under Article 59, an ICJ deci-

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46 U.N. Charter introductory note, art. 110, para. 3, 59 Stat. 1031; *see also* Basic Facts about the United Nations, The United Nations: Organization, *available at* http://www.un.org/aboutun/basicfacts/unorg.htm; Charles Patterson, The Oxford 50th Anniversary Book of the United Nations 7-21 (Oxford University Press) (1995).

47 U.N. Charter art. 92.

48 *Id.*

49 *Id.* art. 93, para. 1.

50 Statute of the International Court of Justice arts. 2-64, June 26, 1945, 59 Stat. 1031 [hereinafter Statute of the ICJ].

51 *Id.* art. 36(1).

sion binds only the parties to that particular case.[52] Article 94 of the United Nations Charter states that each member "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[53] If a party fails to comply with the ICJ's decision, "the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[54]

C. The Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes

The Vienna Convention on Consular Relations was adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on April 24, 1963.[55] The Vienna Convention is a seventy-nine article multilateral treaty that "promotes the effective delivery of consular services in foreign countries, including access to consular assistance when a citizen of one country is arrested, committed to prison or custody pending trial, or detained in any other manner in another country."[56] Mexico, one of the first countries to deposit its ratification with the United Nations Secretary-General after the Con-

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[52] *Id.* art. 59.

[53] U.N. Charter art. 94, para. 1.

[54] *Id.* art. 94, para. 2.

[55] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S .T. 77, 596 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969) [hereinafter Vienna Convention].

[56] *Sorto*, 173 S.W.3d at 477; *see also Sanchez-Llamas*, 126 S.Ct. at 2674 ("The Convention consists of 79 articles regulating various aspects of consular activities.").

vention opened for signatures on April 18, 1961, became bound by Convention on March 19, 1967.[57] With the advice and consent of the Senate, the President ratified the Convention, which became binding on the United States on December 24, 1969.[58]

Article 36 "ensure[s] that no signatory nation denies consular access and assistance to another country's citizens traveling or residing in a foreign country. . . ."[59] Article 36 reads as follows:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by

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[57] Vienna Convention.

[58] *Id.*; *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884 (9th Cir.2000); *see also* Tenagne Tadesse, *The Breard Aftermath: Is the U.S. Listening?*, 8 Sw. J.L. & Trade Am. 423, 429-30 (2002) (discussing the history of the Vienna Convention).

[59] *Sorto*, 173 S.W.3d at 477.

the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[60]

In addition to becoming signatories to the Vienna Convention, Mexico and the United States became parties to the Optional Protocol Concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol states: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a

[60] Vienna Convention, art. 36.

Party to the present Protocol."[61] Although the United States recently withdrew from the Optional Protocol, the United States has agreed to "discharge its inter-national obligations under the decision . . . by having State courts give effect to the [*Avena*] decision. . . ."[62]

D. International Court of Justice Rulings on Article 36 of the Vienna Convention Involving the United States

The ICJ has encountered a series of cases filed against the United States by other nations alleging violations of Article 36 of the Vienna Convention. Paraguay filed the first case on behalf of its citizen, Angel Francisco Breard.[63] The ICJ issued an order, at Paraguay's request, requesting the United States to stay Breard's execution until it could render a decision.[64] Based on that order, Breard filed an original petition for a writ of habeas cor-

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[61] Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, Art. I, 21 U.S.T. 326, T.I.A.S. No. 6820 [hereinafter Optional Protocol].

[62] Presidential Memorandum; *Medellín*, 125 S.Ct. at 2101 (O'Connor J., dissenting); Letter from Alberto Gonzales, U.S. Attorney General, to Greg Abbott, Texas Attorney General (Apr. 5, 2005); United States Department of State, Daily Press Briefing, Mar. 10, 2005, Adam Ereli, Deputy Spokesman, *available at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm (stating "in recognition of the optional protocol and our international commitments, the President has determined that the United States will comply with the judgment of the International Court of Justice and that we will review—our state courts will review—the cases that ICJ responded to.").

[63] *Case Concerning the Vienna Convention on Consular Relations (Para.v.U.S.)*, Application of the Republic of Paraguay, Apr. 3, 1998; *see also Breard*, 523 U.S. at 374.

[64] *Breard*, 523 U.S. at 374.

pus and an application to stay his execution in the Supreme Court of the United States.[65] The Supreme Court found that Breard's claim was procedurally defaulted and denied his petition and application; Breard was later executed.[66] Paraguay then requested that the ICJ discontinue the proceedings with prejudice; thus, the ICJ did not issue a decision regarding Breard.[67]

Subsequently, two more suits were filed, *Federal Republic of Germany v. United States of America (LaGrand)*[68] and *Mexico v. United States of America (Avena)*.[69] In *LaGrand*, Germany initiated proceedings in the ICJ on behalf of two of its citizens, brothers Karl and Walter LaGrand, who had been convicted of murder and sentenced to death in Arizona.[70] Germany alleged that the United States violated Article 36 of the Vienna Convention by failing to inform the LaGrands of their right to contact a German consular official.[71] Although both the LaGrands were executed before the ICJ issued its judgment, the ICJ still found, among other things, that: (1) Article 36 of the Vienna Convention confers individual rights on detained foreign nationals; (2) the United States failed to comply with Article 36; and (3) as applied to the LaGrands, the procedural default rules of the United States prevented the rights intended under Article 36 from being given

65 *Id.*

66 *Id.* at 375-76, 378.

67 *Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, Order of 10 November 1998-Discontinuance.

68 2001 I.C.J. 104 (June 27, 2001).

69 2004 I.C.J. 128 (Mar. 31, 2004).

70 *LaGrand*, 2001 I.C.J. 104, ¶¶ 1, 10, 14.

71 *Id.* ¶¶ 1, 38.

full effect.[72] The court further stated that the United States, "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention."[73]

Almost three years after *LaGrand*, the ICJ handed down its decision in *Avena*. With regard to Medellín and fifty other Mexican nationals, the ICJ concluded that the United States breached its obligations under Article 36, paragraph 1(b) by failing to inform them, after their arrests and without delay, of their right to contact the Mexican consular post.[74] And in forty-nine cases, including Medellín's case, the court found that the United States violated Article 36, paragraphs 1(a) through (c) by failing to: (1) notify the consular post of their detention; (2) enable consular officials to communicate with and have access to them; and (3) enable consular officials to visit with them.[75] The court also found that in Medellín's case, in addition to thirty-three others, the United States violated Article 36, paragraph (c) by preventing consular officials from being able to timely arrange for their citizens' legal representation.[76]

After addressing the United States' and Mexico's arguments concerning the appropriate remedy for the Article 36 violations, the court concluded "that the 'review and reconsideration' prescribed by it in the *LaGrand* case should be effective."[77] Directing the

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72 *LaGrand*, 2001 I.C.J. 104, ¶¶ 77, 90-91, 125.

73 *Id.* ¶ 128(7).

74 *Avena*, ¶¶ 106(1), 153(4).

75 *Id.* ¶¶ 106(2)-(3), 153(5)-(6).

76 *Id.* ¶¶ 106(4), 153(7).

77 *Id.* ¶ 138.

United States to provide review and reconsideration of the convictions and sentences of the Mexican nationals whose individual rights under the Vienna Convention had been violated,[78] the ICJ stated:

> The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.[79]

E. The Presidential Memorandum

After the United States Supreme Court granted certiorari in this case, the President weighed in on the controversy surrounding *Avena* by issuing a memorandum to the United States Attorney General, which states, in pertinent part, as follows:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in . . . [*Avena*], by having State courts give effect to the decision in accordance with gen-

[78] *Id.* ¶¶ 138, 140-41.

[79] *Id.* ¶ 139.

eral principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[80]

III. ANALYSIS

A. *Avena* and The Supremacy Clause

Medellín claims that the ICJ decision in *Avena* is binding federal law that preempts Section 5 of the Texas Code of Criminal Procedure. The State and the United States as *amicus curiae* disagree.

As an initial matter, while we recognize the competing arguments before us concerning whether Article 36 confers privately enforceable rights, a resolution to that issue is not required for our determination of whether *Avena* is enforceable in this Court. Our decision is controlled by the Supreme Court's recent opinion in *Sanchez-Llamas v. Oregon,* and accordingly, we hold that *Avena* is not binding federal law and therefore does not preempt Section 5.

While Medellín's case was pending before us, the Supreme Court granted certiorari in *Sanchez-Llamas v. Oregon*[81] and *Bustillo v. Johnson,*[82] consolidating the two cases to consider: "(1) whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial."[83] The Court issued

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80 Presidential Memorandum.

81 126 S.Ct. 620 (2005).

82 126 S.Ct. 621 (2005).

83 *Sanchez-Llamas,* 126 S.Ct. at 2677.

its decision in these cases during the last week of its 2005 term.[84] Although the Court found it unnecessary to decide whether Article 36 grants privately enforceable rights,[85] the Court held that the exclusionary rule is not a remedy for violations of Article 36[86] and reaffirmed its holding in *Breard*, stating "We . . . conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims."[87]

When addressing petitioner Bustillo's argument that the Court should revisit its decision in *Breard* in light of the ICJ's decisions in *LaGrand* and *Avena*, the Court concluded that ICJ decisions are entitled only to " 'respectful consideration.' "[88] In support of this determination, the Court cited its constitutionally mandated position as the absolute authority in defining a treaty's meaning as federal law[89] and stated that "[i]t is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ."[90] Looking at those agreements, the Court determined that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts."[91] The Court

84 *Id.*

85 *Id.*

86 *Id.* at 2682.

87 *Id.* at 2687.

88 *Id.* at 2683, 2685 (quoting *Breard*, 523 U.S. at 375).

89 *Id.* at 2684.

90 *Id.*

91 *Id.*

noted that under Article 59 of the Statute of the ICJ, an ICJ decision binds only the parties to that case and, as a result, not even the ICJ is bound by its prior decisions.[92] Reviewing Articles 59 and 34 of the Statute, the Court also considered that the "principle purpose [of the ICJ] is to arbitrate particular disputes between national governments."[93] Finally, the Court pointed out that Article 94(2) of the United Nations Charter "contemplates quintessentially *international* remedies" because an aggrieved nation may seek recourse from the Security Council when another nation fails to comply with an ICJ decision.[94] According " 'great weight' "[95] to the meaning placed on the Vienna Convention by the Executive Branch, the Court then noted that even though the President has ordered state courts to give effect to *Avena*, the United States has taken the position that ICJ decisions are not binding on United States courts.[96] Finally, the Court expressed doubt about giving "decisive weight" to *LaGrand* and *Avena* when the United States has since withdrawn from the Optional Protocol.[97]

Granting " 'respectful consideration' "[98] to the *LaGrand* and *Avena* decisions, the Court held that "the ICJ's interpretation cannot overcome the plain import of Article 36."[99] Turning to its prior decision in *Breard*, the Court

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92 *Id.*

93 *Id.*

94 *Id.* at 2685 (original emphasis).

95 *Id.* (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961)).

96 *Id.*

97 *Id.*

98 *Id.* (quoting *Breard*, 523 U.S. at 375).

99 *Id.*

stated: "the procedural rules of domestic law generally govern the implementation of an international treaty."[100] The plain language of Article 36(2)—that Article 36(1) rights "shall be exercised in conformity with the laws and regulations of the receiving State" and that those "laws and regulations must enable full effect to be given" to the intended purpose of the rights in Article 36(1)[101]—means that rules of procedural default apply to Vienna Convention claims just as they apply to claims raised under the United States Constitution.[102] The Court recognized the important role that procedural default rules play in our adversarial justice system[103] and disagreed with the ICJ's interpretation of the "full effect" language in Article 36(2).[104] Noting the problems associated with the ICJ interpretation of the "full effect" language, the Court stated:

> Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication. If the State's failure to inform the defendant of his Article 36 rights generally excuses the defendant's failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the face of Article 36 claims.[105]

100 *Id.*

101 Vienna Convention, art. 36(2).

102 *Sanchez-Llamas*, 126 S.Ct. at 2685.

103 *Id.* at 2685-86.

104 *Id.* at 2686.

105 *Id.*

The Court then stated that the ICJ interpretation "sweeps too broadly"[106] because Article 36(2) also requires that Article 36(1) rights " 'be exercised in conformity with the laws and regulations of the receiving State.' "[107]

In this case, we are bound by the Supreme Court's determination that ICJ decisions are not binding on United States courts. As a result, Medellín, even as one of the named individuals in the decision, cannot show that *Avena* requires us to set aside Section 5 and review and reconsider his Vienna Convention claim.

B. The Presidential Memorandum and the Supremacy Clause

Aligned on the effect of the President's memorandum, both Medellín and the United States as *amicus curiae* contend that the President's February 28, 2005, memorandum preempts Section 5 and, as a result, requires us to review and reconsider Medellín's conviction and sentence as prescribed by *Avena*. In opposition, the State challenges, among other things, the effect of the memorandum's substantive language.

The United States' and Medellín's arguments presume that the President's memorandum to the United States Attorney General amounts to an executive order.[108] The

106 *Id.*

107 *Id.* (quoting Vienna Convention, art. 36(2)).

108 *See generally* 44 U.S.C. §§ 1502, 1504, 1505(a)(1) (2000) (including "Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof . . ." as documents that must be published in the Federal Register); 1 C.F.R. § 1.1 ("Document having general applicability and legal effect means any document issued

State disputes this, arguing that the memorandum does not contain any mandatory language: "While the President's memo rightly shows the intent and determination of the United States to enforce the consular provisions of the Vienna Convention, the memo does not order . . . state courts to disregard controlling precedents, state statutory provisions, or state procedural default rules."[109] The State's position is not without merit, but because we conclude that Medellín has not shown that the President's memorandum entitles him to review and reconsideration, we will assume, without deciding, that the memorandum constitutes an executive order.[110]

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under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations . . ."); 1 C.F.R. § 5.2(a) (including "Presidential proclamations and Executive orders in the numbered series, and each other document that the President submits for publication or orders to be published" among documents that are required to be filed for inspection with the Federal Register and published in the Federal Register).

[109] Br. of Respondent at 41.

[110] *See* Kevin M. Stack, *The Statutory President*, 90 Iowa L.Rev. 539, 546-47 (2005) (observing that "there [are no] legal requirements on the types of directives that the president must issue as an executive order, as opposed to other headings, such as a proclamation, memorandum, directive, or determination" and stating that "the particular form in which a directive is conveyed does not determine its legal effect, and may reflect nothing more than a bureaucratic choice."); Tara L. Branum, *President or King: The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. Legis. 1, 6-7 (2002) (stating that "a congressional study has defined executive orders as 'directives or actions by the President' that have the 'force and effect of law' when 'founded on the authority of the President derived from the Constitution or a statute' " as well as noting that in addition to orders, "[p]residents may also issue proclamations, presidential sign-

"Governmental power over internal affairs is distributed between the national government and the several states."[111] Describing the federal government's powers over internal affairs, the Supreme Court has acknowledged: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[112] With regard to external affairs, the federal government possesses exclusive power; it is "vested with all the powers of government necessary to maintain an effective control of international relations."[113] When acting in external affairs, the President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations."[114] And while the President's power "must be

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ing statements, presidential memoranda, or National Security Presidential Directives, among other types of presidential directives" and stating, "[i]n general, however, the difference is typically one of form, not substance."); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

[111] *United States v. Belmont*, 301 U.S. 324, 330, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); U.S. Const. amend. X; *see also Curtiss-Wright*, 299 U.S. at 316.

[112] *Curtiss-Wright*, 299 U.S. at 315-16; *see also Belmont*, 301 U.S. at 330.

[113] *Curtiss-Wright*, 299 U.S. at 318 (quoting *Burnet v. Brooks*, 288 U.S. 378, 396, 53 S.Ct. 457, 77 L.Ed. 844 (1933)); *see also Pink*, 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested with the national government exclusively."); *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941) ("The federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

[114] *Curtiss-Wright*, 299 U.S. at 320.

exercised in subordination to the applicable provisions of the Constitution," such power is not necessarily dependent on specific congressional authorization.[115] The President, for example, can enter into executive agreements with foreign nations without the advice and consent of the Senate.[116] Valid agreements are accorded the same status as treaties[117] and, consequently, may preempt state law if they " 'impair the effective exercise of the Nation's foreign policy.' "[118] Executive orders issued by the President must be authorized by an act of Congress or by the Constitution.[119]

Justice Jackson, in his concurring opinion in *Youngstown Sheet & Tube Company v. Sawyer,* sought to define the scope of the President's power.[120] Recognizing that he was offering "a somewhat over-simplified grouping" because "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or con-

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115 *Id.*

116 *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 415, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) ("the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress[.]"); *Dames & Moore,* 453 U.S. at 682 ("prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."); *Belmont,* 301 U.S. at 331.

117 *Garamendi,* 539 U.S. at 416; *Pink,* 315 U.S. at 230 ("A treaty is a 'Law of the Land' under the supremacy clause (art. VI, Cl.2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.").

118 *Garamendi,* 539 U.S. at 419 (quoting *Zschernig v. Miller,* 389 U.S. 429, 440, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968)).

119 *Youngstown Sheet & Tube Co.,* 343 U.S. at 585.

120 *Id.* at 635-38 (Jackson, J., concurring).

junction with those of Congress."[121] Justice Jackson related the following:

- The President's "authority is at its maximum" "[w]hen the President acts pursuant to an express or implied authorization of Congress."[122] In such circumstances, the President's power "includes all that he possesses in his own right plus all that Congress can delegate."[123]
- The President's power is in "a zone of twilight" "[w]hen the President acts in absence of either a congressional grant or denial of authority."[124] When acting in "a zone of twilight," the President is dependent on "his own independent powers."[125] And "Congress may have concurrent authority."[126] The "distribution" of authority between the President and Congress may be "uncertain."[127] "[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[128]

121 *Id.* at 635.

122 *Id.*

123 *Id.*

124 *Id.* at 637.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

- The President's "power is at its lowest ebb" "[w]hen the President takes measures incompatible with the expressed or implied will of Congress."[129] When acting at the "lowest ebb," the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[130] Such power, Justice Jackson advised, "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[131]

The President's memorandum cites his authority under the Constitution and laws of the United States.[132] With this in mind, we must decide whether the President has exceeded his power by directing us to give effect to the *Avena* decision under the principles of comity. The President's directive, which is dependent on his power to act in both foreign and domestic affairs, is unprecedented. What Justice Jackson proclaimed in his concurrence in *Youngstown Sheet & Tube Company* fifty-four years ago—that the judiciary "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves" [133]—resonates with us today.

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[129] *Id.*

[130] *Id.*

[131] *Id.* at 638.

[132] Presidential Memorandum.

[133] *Id.* at 634; *Dames & Moore*, 453 U.S. at 661 ("the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.").

We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary. By stating "that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in . . . [*Avena*], by having State courts give effect to the decision . . . [,]"[134] the President's determination is effectively analogous to that decision. In *Sanchez-Llamas,* the Supreme Court made clear that its judicial "power includes the duty 'to say what the law is.' "[135] And that power, according to the Court, includes the authority to determine the meaning of a treaty as a "matter of federal law."[136] The clear import of this is that the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law.

Medellín and the United States argue that the President's authority is at its maximum. In doing so, both rely on the President's inherent foreign affairs power to enter into executive agreements to settle claims with foreign nations as recognized by the Supreme Court in *United States v. Belmont,*[137] *United States v. Pink,*[138] *Dames & Moore v. Regan,*[139] and *American Insurance Association v. Garamendi.*[140] We therefore begin by reviewing these cases.

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134 Presidential Memorandum.

135 *Sanchez-Llamas,* 126 S.Ct. at 2684 (quoting *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 (1803)).

136 *Id.*

137 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

138 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796.

139 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918.

140 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376.

In *Belmont*, a Russian corporation, Petrograd Metal Works, deposited funds with a private New York City banker, Belmont.[141] The Soviet Government "dissolved, terminated and liquidated [Petrograd Metal Works along with other corporations], and nationalized and appropriated all of its property and assets of every kind and wherever situated, including the deposit account with Belmont."[142] The Soviet Government later assigned all amounts owed to it from United States nationals to the United States.[143]

The [Litvinov] [A]ssignment was effected by an exchange of diplomatic correspondence between the Soviet Government and the [Executive Branch of the] United States. The purpose was to bring about a final settlement of the claims and counterclaims between the Soviet Government and the United States; and it was agreed that the Soviet Government would take no steps to enforce claims against American nationals[.] [144]

The assignment was accompanied by the recognition of the Soviet Government by the President of the United States and the establishment of diplomatic relations between the two.[145]

The Supreme Court disagreed with the lower court's holding that giving effect to the Soviet nationalization decree would result in "an act of confiscation" and would be "contrary to the controlling public policy of

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141 301 U.S. at 325-26.

142 *Id.* at 326.

143 *Id.*

144 *Id.*; *Pink*, 315 U.S. at 222-23 (discussing its previous holding regarding the Litvinov Assignment in *Belmont*).

145 *Belmont*, 301 U.S. at 330.

the State of New York."[146] The Court found that the Litvinov Assignment was an international compact between the Soviet and United States governments and that the rule of a treaty's supremacy over state law applies equally to an international compact.[147] "[I]n respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."[148]

In *Pink*, the Supreme Court recognized the Litvinov Assignment's supremacy over a New York court order.[149] The state court had directed Pink, New York's Superintendent of Insurance, to pay foreign creditors' claims with assets previously held by the First Russian Insurance Company.[150] The Court ruled that the United States was entitled to those assets under the Litvinov Assignment because the Soviet Government was the successor of the First Russian Insurance Company.[151] The Court observed that the United States' claims against the Russian Government and its nationals were long-standing impediments to the United States' recognition of the Soviet Government.[152] Acknowledging that the President has implied powers in the field of foreign relations, the Court stated:

> It was the judgment of the political department that full recognition of the Soviet Government required

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146 *Id.* at 327.

147 *Id.* at 330-31.

148 *Id.* at 331.

149 315 U.S. at 227-34.

150 *Id.* at 211.

151 *Id.* at 234.

152 *Id.* at 227.

> the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.[153]

Relying on *Belmont*, the Court declared that the Litvinov Assignment has a "similar dignity" to a treaty under the Supremacy Clause[154] and noted that "state law must yield when it is inconsistent with, or impairs the policy or provisions of . . . an international compact or agreement."[155] The Court went on to conclude:

> The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority.[156]

In *Dames & Moore*, when diplomatic officials were held hostage after the seizure of the American Embassy in Tehran, Iran, the President issued an executive order that "blocked the removal or transfer of 'all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the juris-

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153 *Id.* at 230.

154 *Id.*

155 *Id.* at 230-31.

156 *Id.* at 233.

diction of the United States' " under the International Emergency Economic Powers Act (IEEPA).[157]

Iran released the hostages after it entered into an agreement with the United States to settle their claims, which included the termination of " 'all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.' "[158] Additionally, the United States was obligated to transfer all Iranian assets in the United States to a bank to satisfy any award made by the tribunal against Iran.[159]

The President also issued several executive orders "implementing the terms of the agreement."[160] These Orders revoked all licenses permitting the exercise of 'any right, power, or privilege' with regard to Iranian funds, securities, or deposits; 'nullified' all non-Iranian interests in such assets acquired subsequent to the blocking order . . . ; and required those banks holding Iranian assets to transfer them 'to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.'[161]

Later, the President issued an executive order " 'suspend[ing]' all 'claims which may be presented to the . . . Tribunal' and provided that such claims 'shall have

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157 453 U.S. at 662-63 (quoting Exec. Order No. 12170, 3 C.F.R. 457 (1980), note following 50 U.S.C. § 1701 (1976 ed. Supp. III)).

158 *Id.* at 665.

159 *Id.*

160 *Id.*

161 *Id.* at 665-66 (quoting Exec. Order No. 12279, 46 Fed.Reg. 7919 (1981)).

no legal effect in any action now pending in any court of the United States.' "[162]

Dames & Moore filed suit against the United States and the Secretary of the Treasury "to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran,"[163] arguing that the President exceeded his statutory and constitutional authority.[164]

The Supreme Court implemented Justice Jackson's Presidential powers framework when it considered whether the President was authorized to (1) nullify attachments made after the blocking order, (2) order the transfer of all Iranian assets to the Federal Reserve Bank, and (3) suspend pending court claims.[165] As to the first two, the Court determined that the IEEPA specifically authorized the President's actions, so those actions were, therefore, " 'supported by the strongest of presumptions and the widest latitude of judicial interpretation. . . .' "[166] Because "[a] contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President," the Court held that Dames & Moore did not overcome the presumption in the President's favor.[167]

As to the third, the Court determined that the IEEPA and Hostage Act did not specifically authorize the Pres-

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[162] *Id.* at 666 (quoting Exec. Order No. 12294, 46 Fed.Reg. 14111 (1981)).

[163] *Id.* at 666-67.

[164] *Id.* at 667.

[165] *Id.* at 668.

[166] *Id.* at 674 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring)).

[167] *Id.* (citing *Youngstown Sheet & Tube Co.*, 343 U.S. at 636-37 (Jackson, J., concurring)).

ident to suspend claims pending in United States courts.[168] The Court, however, found those "statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[169] The Court reasoned that the IEEPA gives the President "broad authority . . . to act in times of national emergency with respect to property of a foreign country," and the Hostage Act "indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns."[170] The Court went on to state: "[W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress."[171] Because "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take," a lack of specific congressional approval does not imply disapproval.[172] In fact, Congress may " 'invite' " the exercise of independent presidential authority where there is no indication that Congress sought to limit it and there is a history of congressional acquiescence.[173] Turning to that history, the Court observed that the United States had regularly settled claims against foreign nations on behalf of its nationals

168 *Id.* at 675.

169 *Id.* at 677.

170 *Id.*

171 *Id.* at 678.

172 *Id.*

173 *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring)).

by executive agreement[174] and that "Congress has implicitly approved [that] practice. . . ."[175] Congress's acceptance of such executive action was also demonstrated by the enactment of, and frequent amendment of, the International Claims Settlement Act.[176] Furthermore, pointing to the legislative history of the IEEPA, the Court found that Congress "accepted the authority of the Executive to enter into settlement agreements."[177]

Finally, referring to *Pink*, the Court noted that its prior cases "recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."[178] The Court then held that "the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement-we conclude that the President was authorized to suspend pending claims. . . ."[179] The Court also noted that Congress had not taken any action that would indicate that it disapproved of the agreement.[180]

In *Garamendi*, the United States President and German Chancellor entered into the German Foundation Agreement, which established a foundation funded by Germany and German companies "to compensate all

174 *Id.* at 679-80.

175 *Id.* at 680.

176 *Id.* at 680-81.

177 *Id.* at 681.

178 *Id.* at 682.

179 *Id.* at 686.

180 *Id.* at 687-88.

those 'who suffered at the hands of German companies during the National Socialist era.' "[181] Because numerous class-action suits had been filed in the United States "against companies doing business in Germany during the National Socialist era[,]"[182] Germany's participation in the agreement "was conditioned on some expectation of security from lawsuits in United States courts[.]"[183] It was also "agreed that the German Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC)[,]"[184] a voluntary organization formed before the German Foundation Agreement, which "negotiat[ed] with European insurers to provide information about unpaid insurance policies issued to Holocaust victims and settle[d] . . . claims brought under them."[185]

Before the establishment of the German Foundation Agreement, the California Code of Civil Procedure had been amended to enable "state residents to sue in state court on insurance claims based on acts perpetrated in the Holocaust [.]"[186] And a California statute, the Holocaust Victim Insurance Relief Act (HVIRA), compelled insurance companies doing business in California "to disclose the details of 'life, property, liability, health, annuities, dowry, educational, or casualty insurance policies' issued 'to persons in Europe, which were in effect

181 539 U.S. at 405.

182 *Id.*

183 *Id.*

184 *Id.* at 406.

185 *Id.* at 407.

186 *Id.* at 409.

between 1920 and 1945.' "[187] After California "subpoenas were issued against several subsidiaries of European insurance companies participating in the ICHEIC," the Deputy Secretary of State wrote Garamendi, the California insurance commissioner, and the Governor of California, informing them that HVIRA essentially threatened the establishment of the German Foundation Agreement.[188] When Garamendi vowed to "enforce HVIRA to its fullest,"[189] European and United States insurance companies and the American Insurance Association sought injunctive relief, alleging that HVIRA was unconstitutional.[190]

Before the Supreme Court, the insurance companies, the American Insurance Association, and the United States as *amicus curiae* argued that the German Foundation Agreement preempted HVIRA because it "interferes with foreign policy of the Executive Branch[.]"[191]

The Court began by observing that "[a]lthough the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' "[192] The Court then acknowledged the President's authority to enter into executive agreements and, in par-

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[187] *Id.* (quoting Cal. Ins.Codc Ann. § 13804(a) (West Cum.Supp.2003)).

[188] *Id.* at 411.

[189] *Id.* at 411-12.

[190] *Id.* at 412.

[191] *Id.* at 413.

[192] *Id.* at 414 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 610-11 (Frankfurter, J., concurring)).

ticular, that Congress has acquiesced to the use of those agreements to settle claims of United States nationals against foreign governments.[193] Although the insurance claims at issue were against corporations, as opposed to a foreign government, the Court found that the distinction was not determinative because the President had acted alone in the past to settle wartime claims against private parties.[194]

Confronting preemption, the Court considered the issue under its decision in *Zschernig v. Miller* because the German Foundation Agreement did not contain a preemption clause.[195] In *Zschernig*, the Court held that an Oregon escheat statute, which, as applied, prevented inheritance by nationals of Communist countries,[196] was "an 'intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.' "[197] The *Garamendi* Court noted that *Zschernig* "relied on statements in a number of previous cases open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict."[198] The Court then referred to Justice Harlan's concurring opinion in *Zschernig*, in which he stated that the majority's "implication of preemption of the

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193 *Id.* at 415.

194 *Id.* at 415-16.

195 *Id.* at 417 (discussing *Zschernig*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683).

196 389 U.S. at 430, 432, 436.

197 *Garamendi*, 539 U.S. at 417 (quoting *Zschernig*, 389 U.S. at 432).

198 *Id.* at 418.

entire field of foreign affairs was at odds with some other cases suggesting that in the absence of positive federal action 'the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.' "[199]

Although the Court questioned whether it was necessary to address field and conflict preemption, it decided that even under "Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law."[200] Nevertheless, because Justice Harlan believed that state legislation within its traditional competence may enable the state to prevail, the Court determined "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[201]

Evaluating the President's action first, the Court concluded that the German Foundation Agreement was "within the traditional subject matter of foreign policy in which national, not state, interests are overriding. . . ."[202] The Court acknowledged that

> [t]he approach taken serves to resolve the several competing matters of national concern apparent in the German Foundation Agreement: the national interest in maintaining amicable relationships with current European allies; survivors' interests in a

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199 *Id.* (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring)).

200 *Id.* at 419-20.

201 *Id.* at 420.

202 *Id.* at 421.

> 'fair and prompt' but nonadversarial resolution of their claims so as to 'bring some measure of justice . . . in their lifetimes'; and the companies' interest in securing 'legal peace' when they settle claims in this fashion.[203]

Looking then to California's interests, the Court determined those interests were weak when considered "against the backdrop of traditional state legislative subject matter[.]"[204] Although California had an interest in consumer protection, the Court noted that by limiting HVIRA to certain policies, it was "doubt[ful] that the purpose of the California law [was] an evaluation of corporate reliability in contemporary insuring in the State."[205] The Court also considered California's interest in vindicating "the claims of Holocaust survivors" but determined "that the very same objective dignifies the interest of the National Government in devising its chosen mechanism for voluntary settlements, there being about 100,000 survivors in the country, only a small fraction of them in California."[206]

The Court held that the German Foundation Agreement preempted HVIRA, reasoning, that: HVIRA "undercuts the President's diplomatic discretion and the choice he has made exercising it";[207] "the President's authority to provide for settling claims in winding up international hostilities requires flexibility in wielding 'the coercive power of the national economy' as a tool of

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203 *Id.* at 422-23.

204 *Id.* at 425.

205 *Id.* at 426.

206 *Id.*

207 *Id.* at 423-24.

diplomacy";[208] and "HVIRA is an obstacle to the success of the National Government's chosen 'calibration of force' in dealing with the Europeans using a voluntary approach."[209]

Turning to the case before us, we conclude that the reliance on the President's power to enter into executive agreements to settle disputes with other nations, and even corporations under the limited circumstances described in *Garamendi*, by Medellín and the United States is misplaced. The President has not entered into any such agreement with Mexico relating to the Mexican nationals named in the *Avena* decision. There has been no settlement. Rather, the presidential memorandum is a unilateral act executed in an effort to achieve a settlement with Mexico.

The President's independent foreign affairs power to enter into an executive agreement to settle a dispute with a foreign nation under Article II of the Constitution[210] "has received congressional acquiescence throughout its history. . . ."[211] But there is no similar history of congressional acquiescence relating to the President's authority to unilaterally settle a dispute with another nation by executive order, memorandum, or directive.[212]

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208 *Id.* at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000)).

209 *Id.* at 425 (quoting *Crosby*, 530 U.S. at 380).

210 U.S. Const. art. II, § 1, cl. 1.

211 *Garamendi*, 539 U.S. at 415.

212 *See Youngstown Sheet & Tube Co.*, 343 U.S. at 610-11 (Frankfurter, J., concurring) (stating that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power' vested in the President by § 1 of Art. II.").

So, when issuing the February 28, 2005, memorandum, the President's authority was not at its maximum because the President did not act "pursuant to an express or implied authorization of Congress[.]"[213] With the President's power not being at its zenith here, we must ask whether the President has acted in the "absence of either a congressional grant or denial of authority[.]"[214] Implied congressional ratification of the President's settling of claims with foreign nations is a "practice [that] goes back over 200 years to the first Presidential administration. . . ."[215] Here, the President's unprecedented unilateral action of issuing this memorandum does not fall into the category of presidential power employed in a "zone of twilight" or where "congressional inertia, indifference or quiescence" enabled or invited the conduct of the President.[216] In this context, it is evident that the President's independent power to settle a dispute with a foreign nation, recognized throughout the nation's history, depends on the existence of an executive agreement. Given the extraordinary conduct of the President, unsupported by a history of congressional acquiescence, we find that the President's chosen method for resolving this country's dispute with Mexico is "incompatible with

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[213] *Id.* at 635 (Jackson, J., concurring); *see also Dames & Moore*, 453 U.S. at 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action had been taken in pursuance of its consent . . . .' ") (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474, 35 S.Ct. 309, 59 L.Ed. 673 (1915)).

[214] *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

[215] *Garamendi*, 539 U.S. at 415.

[216] *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

the . . . implied will of Congress[.]"[217] Accordingly, in this instance, we find that the exercise of the President's foreign affairs power "is at its lowest ebb[.]"[218] Having acted contrary to the implied will of Congress, we conclude that the President has exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with *Avena*.

The United States submits that requiring a formal bilateral agreement would (1) " 'hamstring the President in settling international controversies'[219] and weaken this nation's ability to fulfill its treaty obligations"; (2) "fail to recognize the practical reality that there are occasions when a foreign government may acquiesce in a resolution that it is unwilling to formally approve"; (3) "fail to recognize that obtaining a formal agreement can be a time consuming process that is ill-suited for occasions when swift action is required"; and (4) "have the perverse effect of assigning to a foreign government veto power over the President's exercise of his authority over foreign affairs."[220]

Contrary to the United States' contentions, requiring a formal bilateral agreement does not limit or constrain the President's ability to settle international controversies or comply with treaty obligations. The President's ability to negotiate and enter into an executive agreement to settle a dispute with a foreign nation remains. In this case, however, the President failed to avail himself of that mechanism to settle this nation's dispute with

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217 *Id.*

218 *Id.*

219 Br. of United States as *Amicus Curiae*, at 30 (quoting *Garamendi*, 539 U.S. at 416).

220 *Id.*

Mexico. And although it may be time-consuming to obtain an executive agreement, the need for "swift action" does not override what the Constitution requires-an international compact or agreement.

A necessary component of any executive agreement is the negotiation process that precedes it, which ensures that each sovereignty is represented and heard. What is ultimately achieved through that process, which invariably involves compromise, will reflect a meeting of the minds-a settlement that embodies the terms, conditions, rights, and obligations agreed to during the negotiation process. At odds with this is the notion that a "foreign government may acquiesce in a resolution that it is unwilling to formally approve." A Presidential resolution that is based on an evaluation of the means necessary to resolve a dispute and then implemented in anticipation of future acquiescence by a foreign government is not a settlement. The mere possibility of later acquiescence by a foreign government is speculation. Representatives of foreign governments change, and with them, international relations are subject to modification. When it comes to foreign relations, history has proven that a nation deemed an ally on one day, may on the next, be declared an enemy. Finally, the view that an executive agreement allows "a foreign government veto power over the President's exercise of his foreign affairs powers" undermines the purpose of the negotiation process—the accomplishment of an actual settlement.

The absence of an executive agreement between the United States and Mexico is central to our determination that the President has exceeded his inherent foreign affairs power by ordering us to comply with *Avena*. We must make clear, however, that our decision is limited to the issue before us—the effect of the President's February 28, 2005, memorandum. Therefore, we express no

opinion about whether an executive agreement between the United States and Mexico providing for state court compliance with *Avena* would preempt state law.

Medellín also relies on the President's duty to faithfully execute the laws as provided in Article II, Section 3 of the Constitution.[221] According to Medellín, the President "has both the authority and the duty to enforce the United States's treaty obligations within the domestic legal system" because, under the Supremacy Clause, treaties are supreme.[222] Related to this argument is Medellín's contention that

> the President has done nothing more than confirm that the United States will do what it has already promised to do-abide by the decision of the ICJ in a dispute concerning the interpretation and application of the Vienna Convention. That promise was made by [a] constitutionally prescribed process when the President, with the advice and consent of the Senate, entered into the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ Statute.[223]

The Supreme Court's determination about the domestic effect of ICJ decisions-that they are entitled only to " 'respectful consideration' "[224]—based on its interpretation of the Statute of the ICJ and the United Nations Charter in *Sanchez-Llamas*[225] forecloses any argument

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221 U.S. Const. art. II, § 3.

222 Br. of Applicant at 50.

223 *Id.* at 45.

224 *Sanchez-Llamas*, 126 S.Ct. at 2685 (quoting *Breard*, 523 U.S. at 375).

225 *Id.* at 2684-85.

that the President is acting within his authority to faithfully execute the laws of the United States. By directing state courts to give effect to *Avena*, the President has acted as a lawmaker. But, as Justice Black explained in *Youngstown Sheet & Tube*, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[226] The President's February 28, 2005, determination cannot be sustained under the power of the Executive to ensure that the laws are faithfully executed.

Relying again on the enumerated powers of the President, Medellín also contends that "[t]he Constitution explicitly vests the President with authority over diplomatic and consular relations."[227] He argues: "No power is more clearly Presidential than the authority to protect U.S. citizens and their interests abroad."[228] He contends that the ability of the United States to protect its citizens may be compromised if the United States does not comply with *Avena*. Looking to statutory authority, Medellín maintains that by virtue of Title 22 United States Code, Sections 1732 and 402(a)(1)(D), "Congress has specifically referenced the President's duty in the context of protecting U.S. citizens who have been detained or arrested in foreign lands, . . . and in requiring the President to protect foreign nationals in the United States[.]"[229] Under Article II, Section 2, Clause 2 of the Constitution, the President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other

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226 *Youngstown Sheet & Tube Co.*, 343 U.S. at 587.

227 Br. of Applicant at 48 (citing U.S. Const. art. II, § § 2, cl. 2, 3).

228 *Id.*

229 *Id.* at 49 (citing 22 U.S.C. § § 1732, 4802(a)(1)(D)).

public Ministers and Consuls. . . ."[230] And under Article II, Section 3, the President "shall receive Ambassadors and other public Ministers. . . ."[231]

The Hostage Act, Title 22, United States Code, Section 1732, states:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.[232]

Further, Title 22, United States Code, Section 4802, which defines the "Responsibility of the Secretary of State," provides in relevant part:

> (a) Security functions.
>
> (1) The Secretary of State shall develop and implement (in consultation with the heads of other

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230 U.S. Const. art. II, § 2, cl. 2.

231 U.S. Const. art. II, § 3.

232 22 U.S.C. § 1732 (2000).

> Federal agencies having personnel or missions abroad where appropriate and within the scope of the resources made available) policies and programs, including funding levels and standards, to provide for the security of United States Government operations of a diplomatic nature and foreign government operations of a diplomatic nature in the United States. Such policies and programs shall include—
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> * * *
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> (D) protection of foreign missions, international organizations, and foreign officials and other foreign persons in the United States, as authorized by law.[233]

We have no doubt that the President and other executive branch officials play a vital role in protecting the interests of American citizens abroad when necessary. However, we do not construe the constitutional provisions as expressly or implicitly granting the President the authority to mandate state court compliance with the ICJ *Avena* decision, and Medellín cites no precedent that would lead us to conclude otherwise.

Nor can the statutes be read to authorize the President's independent action in this case. First, there is no indication that the Hostage Act specifically grants the President unlimited power to act when the President's objective is to protect the interests of American citizens traveling or residing abroad. In *Dames & Moore*, the Supreme Court reviewed the legislative history of the Hostage Act:

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[233] 22 U.S.C. § 4802(a)(1)(D) (2000).

> Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will. These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment 'in violation of the rights of American citizenship.'[234]

The Court further observed that the proponents of the Act "argued that 'something must be intrusted to the Executive' and that 'the President ought to have the power to do what the exigencies of the case require to rescue a citizen from imprisonment.' "[235] When determining whether the President had the authority to suspend claims in American courts, the Court found that the Hostage Act "indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns ."[236] But implied congressional authority vested in the President to protect United States citizens in response to the hostile acts of another nation where the circumstances are exigent shows that the President's power to protect United States citizens abroad is not unqualified. We cannot accept Medellín's argument that the Hostage Act grants the President unfettered authority to act to protect the interest of United States citizens abroad. It strains logic to conclude that the power delegated to the President under the Hostage Act permits the President to engage in any conduct that will ensure the maintenance of that power.

[234] 453 U.S. at 676 (internal citations omitted).

[235] *Id.* at 678.

[236] *Id.* at 677.

Nevertheless, we need not decide the scope of any implied power conferred to the President under the Hostage Act, because, as we have already concluded in this case, "there is [not] a history of congressional acquiescence in conduct of the sort engaged in by the President."[237] When concluding that the President had the authority to suspend pending court claims in *Dames & Moore*, the Court relied on not only the President's power under the Hostage Act, but on the President's power under the International Emergency Economic Powers Act and the President's power to settle claims with foreign nations by executive agreement.[238] In doing so, the Court specifically noted: "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."[239] We decline to find that the Hostage Act authorizes the President to order this Court to comply with *Avena*.

Although Section 4802(a)(1)(D), Title 22, United States Code, provides that the Secretary of State[240] has the duty to protect "foreign missions, international organizations, and foreign officials and other foreign persons in the United States," that duty extends only to things " 'authorized by law.' "[241] The statute, therefore, cannot be regarded as an independent source of authority for the President's memorandum ordering state courts to comply with *Avena*.

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237 *Id.* at 678-79.

238 *Id.* at 677-82, 686.

239 *Id.* at 680.

240 22 U.S.C. § 2651 (2000) ("There shall be at the seat of government an executive department to be known as the 'Department of State', and a Secretary of State, who shall be the head thereof.").

241 22 U.S.C. § 4802(a)(1)(D).

In further support of its position that the President has the authority to direct state courts to give effect to the ICJ *Avena* decision, the United States directs us to the United Nations Charter and the United Nations Participation Act. The United States maintains that the ratification of the Charter "implicitly grants the President 'the lead role' in determining how to respond to an ICJ decision."[242] And under the United Nations Participation Act, according to the United States, the President, through appointed officials, "represents the United States in the United Nations, including before the ICJ and in the Security Council."[243] Moreover, the United States argues that Congress "expressly anticipated that these officials would . . . perform 'other functions in connection with the participation of the United States in the United Nations' at the direction of the President or his representative to the United Nations."[244]

Titled "Representation in Organization," Title 22, United States Code, Section 287 provides in part:

> (a) Appointment of representative; rank, status and tenure; duties. The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and may serve ex officio as representative of the United

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242 Br. of United States as *Amicus Curiae*, at 20-21 (quoting *Garamendi*, 539 U.S. at 415).

243 *Id.* at 20.

244 *Id.* (quoting 22 U.S.C. § 287(a), (b) (2000)).

States in any organ, commission, or other body of the United Nations other than specialized agencies of the United Nations, and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may, from time to time, direct.

(b) Appointment of additional representatives; rank, status and tenure; duties; reappointment unnecessary. The President, by and with the advice and consent of the Senate, shall appoint additional persons with appropriate titles, rank, and status to represent the United States in the principal organs of the United Nations and in such organs, commissions, or other bodies as may be created by the United Nations with respect to nuclear energy or disarmament (control and limitation of armament). Such persons shall serve at the pleasure of the President and subject to the direction of the Representative of the United States to the United Nations. They shall, at the direction of the Representative of the United States to the United Nations, represent the United States in any organ, commission, or other body of the United Nations, including the Security Council, the Economic and Social Council, and the Trusteeship Council, and perform such other functions as the Representative of the United States is authorized to perform in connection with the participation of the United States in the United Nations. Any Deputy Representative or any other officer holding office at the time the provisions of this Act, as amended, become effective shall not be required to be reappointed by reason of the enactment of this Act, as amended.[245]

[245] 22 U.S.C. § 287(a), (b).

Starting with the United Nations Charter, we hold it does not authorize the type of action that the President has taken here. The President is still bound by the Constitution when deciding how the United States will respond to an ICJ decision,[246] and, as stated above, the President exceeded his implied foreign affairs power by directing state courts to give effect to *Avena*.

Additionally, the subsections of the United Nations Participation Act set forth above do not support the President's determination. Because the participation of the United States in proceedings before the ICJ does not bind the courts of this country to comply with a decision of the ICJ,[247] it necessarily follows that the participation of the United States in the United Nations does not authorize the President to order state courts to give effect to any decision rendered by the ICJ.

Based on the foregoing, we hold that the President's memorandum ordering us to give effect to the ICJ *Avena* decision cannot be sustained under the express or implied constitutional powers of the President relied on by Medellín and the United States or under any power granted to the President by an act of Congress cited by Medellín and the United States.[248] As such, the President has violated the separation of powers doctrine by intruding into the domain of the judiciary, and therefore, Medellín cannot show that the President's memorandum preempts Section 5.

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246 *Curtiss-Wright Export Corp.*, 299 U.S. at 320.

247 *Sanchez-Llamas*, 126 S.Ct. at 2685.

248 *Youngstown Sheet & Tube Co.*, 343 U.S. at 585.

C. Section 5(a)(1), Article 11.071 of the Texas Code of Criminal Procedure

We now consider whether Medellín has satisfied the requirements of Article 11.071, Section 5(a)(1) of the Texas Code of Criminal Procedure so as to permit this Court to review and reconsider his Vienna Convention claim. Section 5(a)(1) provides:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
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> > the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.][249]

Medellín contends that the *Avena* decision and the Presidential memorandum serve as previously unavailable factual and legal bases because both issued after his first application was denied. The State maintains that the legal basis for Medellín's claim, the Vienna Convention, was available before his trial and when he filed his first application. Medellín claims, however, that he is not reasserting the same claim presented on his first application; he contends that the *Avena* decision and the President's memorandum provide him with the right to prospective review and reconsideration. We will address whether the *Avena* decision or the Presidential memo-

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249 Tex.Code Crim. Proc. art. 11.071 § 5(a)(1).

randum qualify as a new factual or legal basis under Section 5(a)(1) separately.

1. Factual Basis

Section 5(e) of Article 11.071 states:

> For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.[250]

What constitutes a "factual basis" under Section 5(a)(1) is not defined. Therefore, to determine whether *Avena* or the President's memorandum qualify as a previously unavailable factual basis under Section 5(a)(1), we must perform a statutory-construction analysis to determine the meaning of "factual."

When interpreting a statute, "we seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation."[251] In doing so, we examine the "literal text"[252] of a statute, which includes all words and phrases,[253] "to discern the fair, objective meaning of that text at the time of its enactment."[254] And "if the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning."[255] We will not

250 Tex.Code Crim. Proc. art. 11.071 § 5(e).

251 *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App.1991).

252 *Id.*

253 *Nguyen v. State*, 1 S.W.3d 694, 696 (Tex.Crim.App.1999).

254 *Boykin*, 818 S.W.2d at 785.

255 *Id.*

give effect to the plain meaning of a statute's text if, when applied, it leads to an absurd result that could not have been intended by the Legislature.[256] When the application of a statute's literal text leads to an absurd result, or the text is ambiguous, we consult extratextual sources to determine a statute's meaning.[257]

In determining the plain meaning of "factual" in Section 5(a)(1), we are guided by the applicable canons of construction, Article 3.01 of the Code of Criminal Procedure, which governs how words in the Code are to be understood,[258] and Section 311.011 of the Texas Government Code (the Code Construction Act), which provides for the common and technical use of words in the Code.[259] Article 3.01 of the Code of Criminal Procedure states that "[a]ll words, phrases and terms used in this Code are to be taken and understood in their ususal acceptation in common language, except where specially defined."[260] The Code Construction Act provides: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage."[261]

To discern what the usual acceptation of the word "factual" is in common language or how it is construed according to the rules of common usage, we look to dictionary definitions.[262] The word "factual," according to

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256 *Id.*

257 *Id.* at 785-86.

258 Tex.Code Crim. Proc. art. 3.01 (Vernon 2004).

259 Tex. Gov't Code § § 311.002, 311.011 (Vernon 2003).

260 Tex.Code Crim. Proc. art. 3.01.

261 Tex. Gov't Code § 311.011(a).

262 *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex.Crim.App.2004); *Lane v. State*, 933 S.W.2d 504, 515 n. 12 (Tex.Crim.App.1996) (cit-

Webster's Third New International Dictionary, means "of, relating to, or concerned with facts" and "restricted to, involving, or based on fact. . . ."[263] The *Dictionary of Modern American Usage* offers two additional definitions-"of or involving facts" and "true."[264] Illustrating the difference between the two definitions, the *Dictionary of Modern American Usage* states that the first meaning "appears in phrases such as *factual finding* and *factual question*," while the second meaning "appears in phrases such as *factual account* and *factual narrative*."[265] The meaning of "factual" in Section 5(a)(1) falls within the first category of phrases described in the *Dictionary of Modern American Usage* because "factual" is paired with the word "basis." We turn our attention to the meaning of the word "fact" according to its usual acceptation in common language and the rules of common usage.

Our review of multiple dictionaries reveals that there are numerous definitions for the word "fact."[266] For instance, *Webster's Third New International Dictionary*

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ing *Bingham v. State*, 913 S.W.2d 208, 209-10 (Tex.Crim.App.1995)) (reaffirming "that use of dictionary definitions of words contained in the statutory language is part of the 'plain meaning' analysis that an appellate court initially conducts [under *Boykin*] to determine whether or not the statute in question is ambiguous.").

263 Webster's Third New International Dictionary 813 (2002).

264 A Dictionary of Modern American Usage 284 (1998).

265 *Id.* at 284-85 (original emphasis).

266 *See* Webster's Third New International Dictionary 813 (2002); The American Heritage College Dictionary 489 (3d ed.2000); Black's Law Dictionary 610 (7th ed.1999); A Dictionary of Modern Legal Usage 346 (2d ed.1995); The Random House Dictionary of the English Language 691 (2d ed.1987); A Concise Dictionary of Law 144 (1983); Jowitt's Dictionary of English Law 764 (2d ed.1977); Ballentine's Law Dictionary 449 (3d ed.1969).

alone contains six definitions.[267] Although there are a variety of definitions for the word "fact," it must be considered in the context in which it appears.[268] We find it instructive that the Legislature expressly distinguished factual basis (fact) from legal basis (law) in Section 5(a)(1). This distinction accounts for the two necessary, but separate, parts of any subsequent claim: the factual basis and the legal basis. With this in mind, we find that the following definition of "fact" from *Black's Law Dictionary* accurately reflects the Legislature's intent: "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation."[269] Giving effect to the plain meaning of "fact" does not lead to an absurd result that the Legislature could not have intended. It is the application of the law to a fact or set of facts that yields the legal effect, consequence, or interpretation. And in some cases, the legal effect, consequence, or interpretation creates a new rule of law.[270]

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267 Webster's Third New International Dictionary 813.

268 Tex. Gov't Code § 311.011; *Lane*, 933 S.W.2d at 515 n. 12.

269 Black's Law Dictionary 610.

270 *See, e.g., Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."); *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding that under

The actual event or circumstance involved in Medellín's case is that law enforcement authorities did not inform Medellín of his right to contact the Mexican consulate after his arrest as required by Article 36(1)(b). This fact provided the factual basis for Medellín's challenge to his conviction and sentence under the Vienna Convention on his first application for a writ of habeas corpus. We disposed of this claim on an independent state ground.[271] Agreeing with the trial court, we found that the legal effect or consequence of Medellín's Vienna Convention claim resulted in the application of our state procedural default rule due to Medellín's failure to object at trial.[272]

Medellín now argues that *Avena* is a previously unavailable factual basis for purposes of Section 5(a)(1). We disagree. For purposes of Section 5(a)(1), the *Avena* decision is properly categorized as law, even though it is not binding on us.[273] The ICJ's decision in *Avena* is not a fact and, therefore, does not qualify as a previously unavailable factual basis under Section 5(a)(1).

As to the President's memorandum, Medellín asserts that "[a] judgment giving rise to new claims issued after an applicant's habeas application renders the factual basis of the claim 'unavailable' under Section 5(a)."[274] Thus, he urges, the President's memorandum is a new

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the Fifth, Sixth and Fourteenth Amendments, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

271 *Ex parte Medellín*, No. WR-50,191-01 (Tex.Crim.App. Oct. 3, 2001) (not designated for publication).

272 *Id.*

273 *Sanchez-Llamas*, 126 S.Ct. at 2682.

274 Br. of Applicant at 54.

"factual basis" entitling him to review. We also disagree with this argument.

Medellín broadly claims that "whether considered as a factual or legal basis . . . the President's Determination was [not] available at the time of his initial application for purposes of Section 5(a)" without further explanation as to how the memorandum constitutes a "factual" basis.[275] Medellín's arguments, however, address the memorandum exclusively as a legal, not factual, basis; he argues that the President's memorandum "constitutes a binding federal rule of decision." But even if Medellín had devised a complete argument that the President's memorandum constitutes a "factual basis," we would still reach the same conclusion. The President's memorandum directs the state courts to give effect to the ICJ *Avena* decision, and in so doing, the President specifically relies on his authority under "the Constitution and the laws of the United States of America. . . ."[276] This indicates that the President intended his memorandum to have the effect of law. According to our earlier analysis of "factual," we determined that the word means "of or involving"[277] "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation."[278] Here, even though we have concluded that the President's memorandum is not binding federal law as argued by Medellín and the United States, we cannot say that the memorandum falls into that definition. For purposes of Section 5(a)(1), like the *Avena* decision, the President's memorandum is properly classified as a "legal basis," not a factual one.

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275 *Id.*

276 Presidential Memorandum.

277 A Dictionary of Modern American Usage 284 (1998).

278 Black's Law Dictionary 610.

2. Legal Basis

Because neither the *Avena* decision nor the President's memorandum constitute a "factual basis," we now consider whether either qualifies as a previously unavailable "legal basis" under Section 5(a)(1). Section 5(d) of Article 11.071 states:

> a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.[279]

Although the *Avena* decision and the Presidential memorandum were not available when Medellín filed his first application, neither constitutes a new legal basis under the plain language of Section 5(d).[280] First, neither has been recognized as providing a right to review and reconsideration in "a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state. . . ."[281] Indeed, as we noted earlier, the United States Supreme Court recently reaffirmed its holding in *Breard*-that procedural default rules may bar Vienna Convention claims.[282] In *Sanchez-Llamas*, the Supreme Court concluded that *Avena* is entitled to only " 'respectful consideration,' "[283] and as such, that decision is not binding

279 Tex.Code Crim. Proc. art. 11.071 § 5(d).

280 *Boykin*, 818 S.W.2d at 785.

281 Tex.Code Crim. Proc. art. 11.071 § 5(d).

282 *Sanchez-Llamas*, 126 S.Ct. at 2687.

283 *Id.* at 2683 (quoting *Breard*, 523 U.S. at 375).

on us. Likewise, because we have concluded that the President has exceeded his authority by ordering state courts to give effect to *Avena*, the President's determination is not binding federal law. Because *Avena* and the President's memorandum are not binding law, neither of them can serve as a previously unavailable legal basis for purposes of Section 5(a)(1).

IV. CONCLUSION

Having found that the ICJ *Avena* decision and the Presidential memorandum do not constitute binding federal law that preempt Section 5 under the Supremacy Clause of the United States Constitution and that neither qualify as a previously unavailable factual or legal basis under Section 5(a)(1), we dismiss Medellín's subsequent application for a writ of habeas corpus under Article 11.071, Section 5.

WOMACK, J., concurs in the result.

KELLER, P.J., filed a concurring opinion.

PRICE, J., filed a concurring opinion.

HERVEY, J., filed a concurring opinion.

COCHRAN, J., filed a concurring opinion in which JOHNSON, and HOLCOMB, JJ., joined.

[CONCURRING OPINION]

KELLER, P.J., filed a concurring opinion.

On behalf of the United States as amicus curiae, the U.S. Attorney General's office has taken the position that President Bush's memorandum constitutes an order requiring this Court to ignore rules of procedural default (including rules governing contemporaneous objections

at trial and statutes governing subsequent habeas corpus applications) and evaluate anew whether applicant was prejudiced by a failure to comply with the Vienna Convention on Consular Relations. I conclude that the President of the United States does not have the power to order a state court to conduct such a review.

"Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' "[1] Nevertheless, the executive's power in this regard is not without limits, as it must still be "exercised in subordination to the applicable provisions of the Constitution."[2] Among the principles enshrined in the United States Constitution is that of federalism-the separate sovereignty of the state and federal governments-embodied in the structure of the Constitution,[3] as well as in the Tenth Amendment.[4] Although federalism was "the

[1] *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 414, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (quoting in part *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring)).

[2] *Id.* at 416 n. 9.

[3] *See* U.S. Const., Arts. I, § 2 (members of the House of Representatives elected by people "of the several States"), § 3 (Senate composed of two senators from each state), § 4 (time, place and manner of elections for representatives and senators prescribed by each state), § 10 (specific prohibitions against the states), II, § 1 (states appoint presidential electors), IV, § 1 (full faith and credit between states), § 2 (privileges and immunities of citizens of the states), § 3 (admission of new states into the union), § 4 (duties of U.S. to its states), V (state ratification of amendments proposed by Congress).

[4] U.S. Const., Amend X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

unique contribution of the Framers [of the U.S. Constitution] to political science and political theory," there remains "much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers."[5] Nevertheless, I agree with Justice Kennedy that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the judiciary] to admit inability to intervene when one or the other level of Government have tipped the scales too far."[6]

In line with Justice Kennedy's pronouncement, the United States Supreme Court has increasingly stepped forward to prevent the national government from intruding into the sphere of state power. The Court has adopted a general policy against federal injunctive interference with the course of a pending state criminal prosecution.[7] The Court has struck down Congressional enactments relating to criminal justice that concerned traditional areas of state authority[8] and that imposed obligations on state officials with respect to a federal regulatory scheme.[9]

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[5] *United States v. Lopez*, 514 U.S. 549, 575, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring).

[6] *Id.* at 578.

[7] *Younger v. Harris*, 401 U.S. 37, 45-54 (1971) (abstention doctrine).

[8] *Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (striking down law criminalizing possession of a firearm in a gun-free school zone); *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (invalidating statutorily-created civil cause of action for victims of gender-motivated violence).

[9] *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (striking provision requiring state and local law enforcement officials to conduct background checks on prospective handgun purchasers).

Although the Court has not struck down a treaty or an executive agreement for impermissibly intruding upon state authority, it has in several instances construed such documents to avoid preemption of state law where the state law in question involved a traditional area of state competence and applied equally to citizens and non-citizens.[10]

One of those instances regards the Vienna Convention treaty itself; the Supreme Court has explicitly recognized that the treaty does not preempt state rules of procedural default.[11] To the extent that the President purports to trump such state rules by the memorandum, then, he does not act pursuant to the treaty's authorization. Nor does he act according to the Optional Protocol, which gave the International Court of Justice (ICJ) jurisdiction of disputes "arising out of the interpretation or application of the Convention" but did not purport to confer jurisdiction regarding the *remedy* to apply in the event the ICJ determined that a violation of the treaty had occurred.[12] Even if the ICJ had been authorized to

[10] *Todok v. Union State Bank*, 281 U.S. 449, 454-455, 50 S.Ct. 363, 74 L.Ed. 956 (1930) (treaty of amity and commerce did not preempt Nebraska homestead law); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 142-143, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) (executive agreement with the Soviet Government assigning economic claims did not preempt New York statute of limitations); *Sanchez-Llamas v. Oregon*, ___ U.S. ___, ___ - ___, 126 S.Ct. 2669, 2682-2688, 165 L.Ed.2d 557 (2006) (Vienna Convention treaty does not preempt state rules of procedural default).

[11] *Sanchez-Llamas, supra.*

[12] Under the ICJ statute, four different topics can be made subject to the international court's compulsory jurisdiction:

a. the interpretation of a treaty;

b. any question of international law;

(footnote continued)

craft a remedy, however, that authorization surely could not include deciding which level or organ of government would implement such a remedy; the latter would be an internal matter for the party-nation itself to determine.

Consequently, the President must depend solely upon his inherent foreign relations power to justify the action he has taken, and as a result, his action should be subject to greater scrutiny. It is true that the President's foreign relations power can accomplish the preemption of state law through, for example, executive agreement.[13] But the treaty process, with the requirement that a supermajority of the Senate concur, is in the United States Constitution for a reason;[14] Alexander Hamilton suggested in the Federalist Papers that the provision operates as an important check on the President's power.[15] I find it significant that this check is exercised by the Senate, the organ of the national government most closely aligned with the states.

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c. the existence of any fact which, if established would constitute a breach of an international obligation,

d. *the nature and extent of the reparation to be made for the breach of an international obligation.*"

Statute of the Court of International Justice, Art. 36, § 2 (emphasis added). The Optional Protocol subjects to the ICJ's compulsory jurisdiction only "[d]isputes arising out of the *interpretation or application* of the Convention." Optional Protocol to Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Art. I (emphasis added).

[13] *Garamendi*, 539 U.S. at 416 ("Generally, then valid executive agreements are fit to preempt state law, just as treaties are," but see caveat referenced earlier in this opinion and cited in footnote 2).

[14] *See* U.S. Const., Art. II, § 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided that two thirds of the Senators present concur").

[15] Alexander Hamilton, Federalist Papers, No. 75.

The Supreme Court has suggested that the proper analysis for determining whether a president's exercise of his foreign relations power preempts state law is to determine first whether the state has acted within an area of "traditional state responsibility," and if it has, to assess the degree of conflict with federal policy and the strength of the state interest involved.[16] Unlike other federal preemption cases in which a state has prevailed, we address here an express, stark conflict between the President's assertion of power (at least under the Justice Department's interpretation) and the state law at issue. Nevertheless, given the principle that a weighty state interest lessens the likelihood of federal preemption, it follows that a president cannot use his foreign affairs authority to intrude into the state arena with impunity: at some point, the national interest is served in too attenuated a manner by the specific presidential action, and the state interest intruded upon is too fundamental, to permit a president's intervention.

Such a case is now before us. Criminal justice is an area primarily of state concern. The Supreme Court has repeatedly recognized that the "States possess primary authority for defining and enforcing the criminal law."[17] And states have, to say the least, an overwhelming interest in the procedures followed in their own courts. In *Younger*, the Supreme Court found that "a proper respect for state functions" counseled against injunctive interference by the federal courts with the progress of a state prosecution.[18] But the presidential memorandum attempts

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[16] *Garamendi*, 539 U.S. at 420, 420 n. 11.

[17] *Lopez*, 514 U.S. at 561 n. 3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982))).

[18] 401 U.S. at 44.

to do something just as intrusive: it attempts to *force* the states to conduct proceedings they would not otherwise conduct and to do so in a manner inconsistent with their own procedures. The Supreme Court has itself refrained from engaging in this kind of "lawmaking."[19] Moreover, the memorandum ignores "the importance of the procedural default rules in an adversary system."[20] These rules, which are neutral-applying to everyone, not just foreign nationals-"are designed to encourage parties to raise their claims promptly and to vindicate the law's important interest in finality of judgments."[21] When a habeas petitioner asked the United States Supreme Court in *Sanchez-Llamas* to exempt Vienna Convention claims from the rules of procedural default, the Court responded that the relief requested was "by any measure, extraordinary."[22] The Court observed that the exception to procedural default rules requested in that case (as in this one) "is accorded to almost no other right, including many of our most fundamental constitutional protections."[23] The President's action here is unprecedented.

And such extraordinary action is not necessary. The adversary system offers the foreign national the opportunity to raise a Vienna Convention claim before or dur-

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19 *Sanchez-Llamas*, 126 S.Ct. at 2680 ("where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own"), 2687 (The petitioner "asks us to require the *States* to hear Vienna Convention claims raised for the first time in *state* post-conviction proceedings. Given that the convention itself imposes no such requirement, we do not perceive any grounds for us to revise state procedural rules in this fashion.") (emphasis in original).

20 *Id.* at 2685.

21 *Id.*

22 *Id.* at 2687.

23 *Id.* at 2688.

ing trial. If he does so, the trial court is in a position to afford an appropriate remedy—if a judicial remedy is appropriate at all.[24] If the foreign national is represented by counsel, and counsel fails to raise the Vienna Convention issue in a timely fashion, then a "safety valve" exists in the form of an ineffective assistance of counsel claim that can be raised on an initial application for writ of habeas corpus. If all other avenues in the state are exhausted, the foreign national can still apply to the Board of Pardons and Parole and the Governor for executive clemency. And the foreign national has the option to litigate a habeas petition in the federal system.

The President has made an admirable attempt to resolve a complicated issue involving the United States' international obligations. But this unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution. As a consequence, the presidential memorandum does not constitute a new legal or factual basis for relief under Art. 11 .071, § 5, nor does it override § 5's requirements.

With these comments, I concur in the judgment with regard to the analysis of the president's memorandum and otherwise join the Court's opinion.

CONCURRING OPINION

PRICE, J., filed a concurring opinion.

I agree with the majority's analysis and rationale, and, therefore, join the majority. Nevertheless, I write separately to advise law enforcement of this State to honor the provisions of Article 36 of the Vienna Convention

[24] *See Id.* at 2680 (expressing doubt about the appropriateness of a judicial remedy).

and apprise foreign nationals of their rights under the treaty.

A key issue, however, is the question of whether Article 36 of the Vienna Convention even confers individual rights upon detained foreign nationals. I believe it does. Pertinent language of the treaty states "if [the detained foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post . . . ."[1] Since a foreign national may request that the consular official be notified, it is quite logical to conclude that it is the foreign national's personal decision to make whether the consulate is or is not notified. This decision is not left to public or diplomatic officials; rather, the detainee is to decide. Furthermore, the treaty explicitly directs a consular officer to desist in aiding a detained national if that is the national's desire.[2] This language provides additional support for the position that Article 36 creates individual rights for the signatory-nation's citizenry. It is apparent that the power of choice is left to the foreign national. Though the United States Supreme Court has not directly ruled on this issue, a strong voice on that Court favors the position that individual rights are conferred by the Vienna Convention.[3]

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[1] Vienna Convention on Consular Relations and Optional Protocol on Disputes ("Vienna Convention") art. 36(1)(b), *done* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[2] *Id.* at art. 36(1)(c).

[3] *See Sanchez-Llamas v. Oregon*, — U.S. —, —, 126 S.Ct. 2669, 2688, 165 L.Ed.2d 557 (2006) (Ginsberg, J., concurring) (agreeing with the dissent of Justice Breyer, Justice Stevens and Justice Souter that the Vienna Convention "grants rights that may be invoked by an individual in a judicial proceeding"). Since the Court decided the case on procedural default grounds, the majority in *Sanchez-Llamas* assumed, without deciding, that the treaty grants individual rights. *Id.* at 2674.

Article 36 of the Vienna Convention provides foreign nationals the option to invoke their right of access and communication with the consular officer.[4] Without being aware of this option, the vast majority of nationals arrested will almost certainly fail to invoke this right and succumb to our procedural default rules. Since I agree with the majority's application of procedural default to Article 36, I find it all the more imperative for a foreign national in the custody of law enforcement in this State to be informed of his treaty rights. Unless he is informed of what his rights are under the Vienna Convention, those rights will be of no use to him. One must be aware of these rights before one can properly exercise them. Not only is it imperative as a practical matter, Article 36 compels it.[5]

So long as the United States recognizes the Vienna Convention on Consular Relations, this State and all law enforcement that fall within its boundaries are required to faithfully comply with the Convention's agreed-upon provisions.[6] The fact that this State borders a foreign nation only amplifies the need for authorities to be well-versed in the language of Article 36. I believe this does not create an undue burden on law enforcement, but brings to light an obligation that must be fulfilled in the same manner we all hope is reciprocated by other nations whose detained nationals might be United States citizens. With these additional comments, I respectfully join the majority.

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[4] Vienna Convention art. 36(1), *supra* fn. 1.

[5] *See* Vienna Convention art. 36(1)(b), *supra* fn. 1 ("The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.]").

[6] U.S. Const. art. VI, cl. 2.

CONCURRING OPINION

HERVEY, J., filed a concurring opinion.

This international *cause célèbre* centers around this applicant who makes no claim that he did not brutally rape and murder two teenage girls (ages 14 and 16) with fellow gang members over 13 years ago in the summer of 1993. The evidence from applicant's 1994 trial shows that he boasted about his active participation in these crimes. He bragged about how he sexually assaulted the two victims. He related that he put his foot on the throat of one of the girls because he was having difficulty strangling her with a shoelace and she would not die. The girls were unrecognizable when their bodies were found.

This case has dragged on for an amount of time equal to almost the entirety of the lives of these two girls. For many years, in both state and federal courts, applicant has received the almost unparalleled due process protections afforded by our country's laws. Now, from halfway around the world, the International Court of Justice in its *Avena* decision has ordered our state courts to review applicant's Article 36 Vienna Convention claim which applicant did not even raise until his first state habeas application. The President of the United States has made a similar request.

But, all of this is really much ado about nothing because applicant received essentially the review mandated by the *Avena* decision during his initial state habeas corpus proceeding.[1] The Court's 60 plus page opinion disposing of applicant's current successive

[1] *See, e.g.*, Amicus Brief of the Criminal Justice Legal Foundation at 5 (question of whether the Texas courts are required to comply with *Avena* decision is moot because applicant has already received the adjudication to which *Avena* says he is entitled).

habeas corpus application provides applicant with much more than he deserves and is also consistent with the President's unprecedented memorandum expressing the United States' intent to discharge its international obligations under *Avena* "by having State courts give effect to the [*Avena*] decision in accordance with general principles of comity." The Court's opinion in this proceeding affords the *Avena* decision all the "respectful consideration" that it deserves "in accordance with general principles of comity."

Finally, applicant is by no means a stranger in a strange land. He has lived in this country and enjoyed its benefits since he was three-years old. From the record, it appears that he is fluent in English. Other than his surname, there is nothing to suggest that he is anything other than native-born. Indeed, he did not bother telling the police of his non-citizenship. And the constitutional rights available to all accused persons in American courts are his, as well. According to the record, they were scrupulously protected.

Nevertheless, applicant maintains that the lack of intentional, reckless, or negligent wrongdoing by the State (other than, perhaps, the lack of clairvoyance), and despite his non-assertion of any privilege or immunity, he is entitled to an immunity heretofore not afforded to any citizen or nonresident under Texas or Federal law-immunity from procedural default. He argues that he has this immunity simply because he happened to be born on foreign soil approximately 28 years ago and, for whatever reason, has elected not to apply for United States citizenship.

With these comments, I join the Court's opinion.

OPINION

COCHRAN, J., filed a concurring opinion, in which JOHNSON, and HOLCOMB, JJ., joined.

I join all of the Court's opinion except for Section IIIB dealing with the Presidential Memorandum. I am unable to conclude that a memorandum from the President to his Attorney General constitutes the enactment of federal law that is binding on all state courts. This memorandum, discussing compliance with the decision of the International Court of Justice in *Avena*, looks much more like a memo than a law. The Solicitor General, in his amicus brief, has attached a copy of the President's memo, entitled "Memorandum for the Attorney General[,]" as well as a copy of a letter written by Attorney General Alberto R. Gonzales to The Honorable Greg Abbott, the Attorney General of the State of Texas, discussing that memo. We normally do not consider documents that are attached to briefs for the truth of the matters contained within them.[1] But of course this Court may always take judicial notice of laws because laws are printed and promulgated in official gov-

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[1] *See Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex.Crim.App. 2004) ("There is no provision in article 11.071 that permits either the State or the habeas applicant to submit original evidence directly to this Court. Evidentiary affidavits, letters, transcripts, or other documents relating to a habeas claim should not be attached to motions or briefs, and they shall not, and will not, be considered by this Court.") *Surety Ins. Co. of Cal. v. State*, 556 S.W.2d 329, 331 (Tex.Crim.App.1977) (exhibits attached to a brief cannot be considered "as these papers are not part of the official record"); *Ex parte Schoen*, 460 S.W.2d 923, 925 (Tex.Crim.App.1970) (supporting papers pertaining to an extradition cause, attached to a document in the appellate record, are not properly before the court because they were not introduced during the habeas proceeding).

ernment volumes and are readily available to any interested member of the public.[2]

Presidential proclamations and Executive orders, except those which do not have general applicability and legal effect or are effective only against federal agencies, are drafted, reviewed, and promulgated in a specific manner and then published in the Federal Register.[3]

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[2] *See Plaster v. State*, 567 S.W.2d 500, 502 (Tex.Crim.App. 1978); *Mosqueda v. Albright Transfer & Storage Co.*, 320 S.W.2d 867, 876 (Tex.Civ.App.-Fort Worth 1959, writ ref'd n.r.e.) (op. on reh'g). In *Mosqueda*, the court of civil appeals suggested that Texas courts

> must take judicial notice of the laws of the United States, including all the public acts and resolutions of Congress and proclamations of the president thereunder. Administrative rules adopted by boards, departments, and commissions pursuant to federal statutes are also matters of judicial knowledge. When such regulations are published in the Federal Register a federal statute provides that their contents shall be judicially noticed.

Id. (quoting Roy R. Ray & William F. Young, Jr., Texas Law of Evidence Civil and Criminal § 172 (2d ed.1956)).

[3] *See generally* 44 U.S.C. § 1505(a)(1) ("Documents having general applicability and legal effect means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations . . ."). The Presidential Executive Order of September 9, 1987, stipulates the manner in which proposed Executive orders and proclamations are to be prepared, printed, and published: these requirements include:

> (g) Proclamations issued by the President shall conclude with the following described recitation—
>
> "IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, in the year of our lord, and

(*footnote continued*)

This memo is not written in the manner prescribed for Presidential Proclamations or Executive Orders. It is written in a private memo style. I am unable to find a copy of this memo published in the Federal Register. In fact, the only public publication of this memo that I can find is on the White House Press Release Internet website.[4] I cannot accept the proposition that binding federal

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of the Independence of the United States of America, the _____.

. . .

Sec. 2. Routing and approval of drafts.

(a) A proposed Executive order or proclamation shall first be submitted, with seven copies thereof, to the Director of the Office of Management and Budget, together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations.

(b) If the Director of the Office of Management and Budget approves the proposed Executive order or proclamation, he shall transmit it to the Attorney General for his consideration as to both form and legality.

. . . .

Sec. 3. Routing and certification of originals and copies. (a) If the order or proclamation is signed by the President, the original and two copies thereof shall be forwarded to the Director of the Office of the Federal Register for publication in the Federal Register.

(b) The Office of the Federal Register shall cause to be placed upon the copies of all Executive orders and proclamations forwarded as provided in subsection (a) of this section the following notation, to be signed by the Director or by some person authorized by him to sign such notation: "Certified to be a true copy of the original."

[4] http://www.whitehouse.g ov/news/releases/2005/02/20050228-18. html.

law, either through Congressional enactment or Executive Order, can be accomplished through a Presidential press release of a private memorandum directed to the Attorney General. Thus, I cannot accept the premise that the President's memo to his Attorney General is federal law that could supercede and obviate a clear and explicit Texas statute.[5] Thus, I find it unnecessary to undertake a separation of powers analysis as does the majority.

[5] Ironically, the very law that the President's memo would supercede, article 11.071 of the Texas Code of Criminal Procedure, is a legislative enactment that the President, while Governor of the State of Texas, signed into law on June 7, 1995. *See* "The Habeas Corpus Reform Act," 74th Leg., R.S., ch.319, § 1, 1995 Tex. Gen. Laws 2764.

Constitutional, Treaty, and Statutory Provisions Involved

Constitution of the United States of America

Article II, Section 1, Clause 1

The executive Power shall be vested in a President of the United States of America. . . .

Article II, Section 2, Clause 2

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Art. VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 487

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

U.N. Charter, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031

Article 94(1)

Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

Statute of the International Court of Justice, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1055

Article 36(1)

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

United States Code

22 U.S.C. § 287(a)

The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and may serve ex officio as representative of the United States in any organ, commission, or other body of the United Nations other than specialized agencies of the United Nations, and shall perform such other functions in connection with the participation of the United States in the

United Nations as the President may, from time to time, direct.

22 U.S.C. § 287a

The representatives provided for in section 287 of this title, when representing the United States in the respective organs and agencies of the United Nations, shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President, and such representatives shall, in accordance with such instructions, cast any and all votes under the Charter of the United Nations.

22 U.S.C. § 1732

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

22 U.S.C. § 4802(a)(1)(D)

(1) The Secretary of State shall develop and implement (in consultation with the heads of other Federal

agencies having personnel or missions abroad where appropriate and within the scope of the resources made available) policies and programs, including funding levels and standards, to provide for the security of United States Government operations of a diplomatic nature and foreign government operations of a diplomatic nature in the United States. Such policies and programs shall include—

. . .

(D) protection of foreign missions, international organizations, and foreign officials and other foreign persons in the United States, as authorized by law.

Texas Code of Criminal Procedure

Article 11.071, § 5(a), (d)-(e)

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

. . .

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

INTERNATIONAL COURT OF JUSTICE

YEAR 2004

2004

31 March

General List

No. 128

31 March 2004

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO *v.* UNITED STATES OF AMERICA)

Facts of the case — Article 36 of the Vienna Convention on Consular Relations of 24 April 1963.

* *

Mexico's objection to the United States objections to jurisdiction and admissibility —United States objections not presented as preliminary objections —Article 79 of Rules of Court not pertinent in present case.

* *

Jurisdiction of the Court.

First United States objection to jurisdiction — Contention that Mexico's submissions invite the Court to rule on the operation of the United States criminal justice system — Jurisdiction of Court to determine the nature and extent of obligations arising under Vienna Convention — Enquiry into the conduct of criminal proceedings in United States courts a matter belonging to the merits.

Second United States objection to jurisdiction — Contention that the first submission of Mexico's Memorial is excluded from the Court's jurisdiction — Mexico defending an interpretation of the Vienna Convention whereby not only the absence of consular notification but also the arrest, detention, trial and conviction of its nationals were unlawful, failing such notification — Interpretation of Vienna Convention a matter within the Court's jurisdiction.

Third United States objection to jurisdiction — Contention that Mexico's submissions on remedies go beyond the Court's jurisdiction — Jurisdiction of Court to consider the question of remedies —Question whether or how far the Court may order the requested remedies a matter belonging to the merits.

Fourth United States objection to jurisdiction —Contention that the Court lacks jurisdiction to determine whether or not consular notification is a human right — Question of interpretation of Vienna Convention.

* *

Admissibility of Mexico's claims.

First United States objection to admissibility — Contention that Mexico's submissions on remedies seek to have the Court function as a court of criminal appeal — Question belonging to the merits.

Second United States objection to admissibility — Contention that Mexico's claims to exercise its right of diplomatic protection are inadmissible on grounds that local remedies have not been exhausted — Interdependence in the present case of rights of the State and of individual rights — Mexico requesting the Court to rule on the violation of rights which it suffered both directly and through the violation of individual rights of its nationals — Duty to exhaust local remedies does not apply to such a request.

Third United States objection to admissibility — Contention that certain Mexican nationals also have United States nationality — Question belonging to the merits.

Fourth United States objection to admissibility — Contention that Mexico had actual knowledge of a breach but failed to bring such breach to the attention of the United States or did so only after considerable delay — No contention in the present case of any prejudice caused by such delay — No implied waiver by Mexico of its rights.

Fifth United States objection to admissibility — Contention that Mexico invokes standards that it does not follow in its own practice —Nature of Vienna Convention precludes such an argument.

* *

Article 36, paragraph 1 — Mexican nationality of 52 individuals concerned —United States has not proved its contention that some were also United States nationals.

Article 36, paragraph 1 (b) *— Consular information — Duty to provide consular information as soon as arresting authorities realize that arrested person is a foreign national, or have grounds for so believing — Provision of consular information in parallel with reading of "Miranda rights" —Contention that seven individuals stated at the time of arrest that they were United States nationals —Interpretation of phrase "without delay" — Violation by United States of the obligation to provide consular information in 51 cases.*

Consular notification — Violation by United States of the obligation of consular notification in 49 cases.

Article 36, paragraph 1 (a) *and* (c) *— Interrelated nature of the three subparagraphs of paragraph 1 — Violation by United States of the obligation to enable Mexican consular officers to communicate with, have access to and visit their nationals in 49 cases — Violation by United States of the obligation to enable Mexican consular officers to arrange for legal representation of their nationals in 34 cases.*

Article 36, paragraph 2 —"Procedural default" rule —Possibility of judicial remedies still open in 49 cases — Violation by United States of its obligations under Article 36, paragraph 2, in three cases.

* *

Legal consequences of the breach.

Question of adequate reparation for violations of Article 36 — Review and reconsideration by United States courts of convictions and sentences of the Mexican nationals — Choice of means left to United States — Review and reconsideration to be carried out by taking account of violation of Vienna Convention rights — "Procedural default" rule.

Judicial process suited to the task of review and reconsideration — Clemency process, as currently practised within the United States criminal justice system, not sufficient in itself to serve as appropriate means of "review and reconsideration" — Appropriate clemency procedures can supplement judicial review and reconsideration.

Mexico requesting cessation of wrongful acts and guarantees and assurances of non-repetition — No evidence to establish "regular and continuing" pattern of breaches by United States of Article 36 of Vienna Convention — Measures taken by United States to comply with its obligations under Article 36, paragraph 1 — Commitment undertaken by United States to ensure implementation of its obligations under that provision.

* *

No a contrario *argument can be made in respect of the Court's findings in the present Judgment concerning Mexican nationals.*

* *

United States obligations declared in Judgment replace those arising from Provisional Measures Order of 5 February 2003 — In the three cases where the United States violated its obligations under Article 36, paragraph 2, it must find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in the Judgment.

JUDGMENT

Present: *President* SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, TOMKA; *Judge* ad hoc SEPÚLVEDA; *Registrar* COUVREUR.

In the case concerning Avena and other Mexican nationals,

between

the United Mexican States,

represented by

H.E. Mr. Juan Manuel Gómez-Robledo, Ambassador, former Legal Adviser, Ministry of Foreign Affairs, Mexico City,

as Agent;

H.E. Mr. Santiago Oñate, Ambassador of Mexico to the Kingdom of the Netherlands,

as Agent (until 12 February 2004);

Mr. Arturo A. Dager, Legal Adviser, Ministry of Foreign Affairs, Mexico City,

Ms María del Refugio González Domínguez, Chief, Legal Co-ordination Unit, Ministry of Foreign Affairs, Mexico City,

as Agents (from 2 March 2004);

H.E. Ms Sandra Fuentes Berain, Ambassador-Designate of Mexico to the Kingdom of the Netherlands,

as Agent (from 17 March 2004);

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris II (Panthéon-Assas) and at the European University Institute, Florence,

Mr. Donald Francis Donovan, Attorney at Law, Debevoise & Plimpton, New York,

Ms Sandra L. Babcock, Attorney at Law, Director of the Mexican Capital Legal Assistance Programme,

Mr. Carlos Bernal, Attorney at Law, Noriega y Escobedo, and Chairman of the Commission on International Law at the Mexican Bar Association, Mexico City,

Ms Katherine Birmingham Wilmore, Attorney at Law, Debevoise & Plimpton, London,

Mr. Dietmar W. Prager, Attorney at Law, Debevoise & Plimpton, New York,

Ms Socorro Flores Liera, Chief of Staff, Under-Secretariat for Global Affairs and Human Rights, Ministry of Foreign Affairs, Mexico City,

Mr. Víctor Manuel Uribe Aviña, Head of the International Litigation Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

as Counsellors and Advocates;

Mr. Erasmo A. Lara Cabrera, Head of the International Law Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

Ms Natalie Klein, Attorney at Law, Debevoise & Plimpton, New York,

Ms Catherine Amirfar, Attorney at Law, Debevoise & Plimpton, New York,

Mr. Thomas Bollyky, Attorney at Law, Debevoise & Plimpton, New York,

Ms Cristina Hoss, Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg,

Mr. Mark Warren, International Law Researcher, Ottawa,

as Advisers;

Mr. Michel L'Enfant, Debevoise & Plimpton, Paris,

as Assistant,

and

the United States of America,

represented by

The Honourable William H. Taft, IV, Legal Adviser, United States Department of State,

as Agent;

Mr. James H. Thessin, Principal Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

Mr. Patrick F. Philbin, Associate Deputy Attorney General, United States Department of Justice,

Mr. John Byron Sandage, Attorney-Adviser for United Nations Affairs, United States Department of State,

Mr. Thomas Weigend, Professor of Law and Director of the Institute of Foreign and International Criminal Law, University of Cologne,

Ms Elisabeth Zoller, Professor of Public Law, University of Paris II (Panthéon-Assas),

as Counsel and Advocates;

Mr. Jacob Katz Cogan, Attorney-Adviser for United Nations Affairs, United States Department of State,

Ms Sara Criscitelli, Member of the Bar of the State of New York,

Mr. Robert J. Erickson, Principal Deputy Chief, Criminal Appellate Section, United States Department of Justice,

Mr. Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice,

Mr. Steven Hill, Attorney-Adviser for Economic and Business Affairs, United States Department of State,

Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,

Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,

Mr. Peter W. Mason, Attorney-Adviser for Consular Affairs, United States Department of State,

as Administrative Staff,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 9 January 2003 the United Mexican States (hereinafter referred to as "Mexico") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations" of 24 April 1963 (hereinafter referred to as the "Vienna Convention") allegedly committed by the United States.

In its Application, Mexico based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the "Optional Protocol").

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 9 January 2003, the day on which the Application was filed, the Mexican Government also filed in the

Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By an Order of 5 February 2003, the Court indicated the following provisional measures:

"*(a)* The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

(b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order."

It further decided that, "until the Court has rendered its final judgment, it shall remain seised of the matters" which formed the subject of that Order.

In a letter of 2 November 2003, the Agent of the United States advised the Court that the United States had "informed the relevant state authorities of Mexico's application"; that, since the Order of 5 February 2003, the United States had "obtained from them information about the status of the fifty-four cases, including the three cases identified in paragraph 59 (1) *(a)* of that Order"; and that the United States could "confirm that none of the named individuals [had] been executed".

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

5. By an Order of 5 February 2003, the Court, taking account of the views of the Parties, fixed 6 June 2003

and 6 October 2003, respectively, as the time-limits for the filing of a Memorial by Mexico and of a Counter-Memorial by the United States.

6. By an Order of 22 May 2003, the President of the Court, on the joint request of the Agents of the two Parties, extended to 20 June 2003 the time-limit for the filing of the Memorial; the time-limit for the filing of the Counter-Memorial was extended, by the same Order, to 3 November 2003.

By a letter dated 20 June 2003 and received in the Registry on the same day, the Agent of Mexico informed the Court that Mexico was unable for technical reasons to file the original of its Memorial on time and accordingly asked the Court to decide, under Article 44, paragraph 3, of the Rules of Court, that the filing of the Memorial after the expiration of the time-limit fixed therefor would be considered as valid; that letter was accompanied by two electronic copies of the Memorial and its annexes. Mexico having filed the original of the Memorial on 23 June 2003 and the United States having informed the Court, by a letter of 24 June 2003, that it had no comment to make on the matter, the Court decided on 25 June 2003 that the filing would be considered as valid.

7. In a letter of 14 October 2003, the Agent of Mexico expressed his Government's wish to amend its submissions in order to include therein the cases of two Mexican nationals, Mr. Víctor Miranda Guerrero and Mr. Tonatihu Aguilar Saucedo, who had been sentenced to death, after the filing of Mexico's Memorial, as a result of criminal proceedings in which, according to Mexico, the United States had failed to comply with its obligations under Article 36 of the Vienna Convention.

In a letter of 2 November 2003, under cover of which the United States filed its Counter-Memorial within the time-limit prescribed, the Agent of the United States informed the Court that his Government objected to the amendment of Mexico's submissions, on the grounds that the request was late, that Mexico had submitted no evidence concerning the alleged facts and that there was not enough time for the United States to investigate them.

In a letter received in the Registry on 28 November 2003, Mexico responded to the United States objection and at the same time amended its submissions so as to withdraw its request for relief in the cases of two Mexican nationals mentioned in the Memorial, Mr. Enrique Zambrano Garibi and Mr Pedro Hernández Alberto, having come to the conclusion that the former had dual Mexican and United States nationality and that the latter had been informed of his right of consular notification prior to interrogation.

On 9 December 2003, the Registrar informed Mexico and the United States that, in order to ensure the procedural equality of the Parties, the Court had decided not to authorize the amendment of Mexico's submissions so as to include the two additional Mexican nationals mentioned above. He also informed the Parties that the Court had taken note that the United States had made no objection to the withdrawal by Mexico of its request for relief in the cases of Mr. Zambrano and Mr. Hernández.

8. On 28 November 2003 and 2 December 2003, Mexico filed various documents which it wished to produce in accordance with Article 56 of the Rules of Court. By letters dated 2 December 2003 and 5 December 2003, the Agent of the United States informed the Court that his Government did not object to the production of these

new documents and that it intended to exercise its right to comment upon these documents and to submit documents in support of its comments, pursuant to paragraph 3 of that Article. By letters dated 9 December 2003, the Registrar informed the Parties that the Court had taken note that the United States had no objection to the production of these documents and that accordingly counsel would be free to refer to them in the course of the hearings. On 10 December 2003, the Agent of the United States filed the comments of his Government on the new documents produced by Mexico, together with a number of documents in support of those comments.

9. Since the Court included upon the Bench no judge of Mexican nationality, Mexico availed itself of its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Bernardo Sepúlveda.

10. Pursuant to Article 53, paragraph 2, of its Rules, the Court, having consulted the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

11. Public sittings were held between 15 and 19 December 2003, at which the Court heard the oral arguments and replies of:

For Mexico: H.E. Mr. Juan Manuel Gómez-Robledo,
Ms Sandra L. Babcock,
Mr. Víctor Manuel Uribe Aviña,
Mr. Donald Francis Donovan,
Ms Katherine Birmingham Wilmore,
H.E. Mr. Santiago Oñate,
Ms Socorro Flores Liera,
Mr. Carlos Bernal,

Mr. Dietmar W. Prager,
Mr. Pierre-Marie Dupuy.

For the United States: The Honourable William H. Taft, IV,
Ms Elisabeth Zoller,
Mr. Patrick F. Philbin,
Mr. John Byron Sandage,
Ms Catherine W. Brown,
Mr. D. Stephen Mathias,
Mr. James H. Thessin,
Mr. Thomas Weigend.

*

12. In its Application, Mexico formulated the decision requested in the following terms:

"The Government of the United Mexican States therefore asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its

municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico

and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts."

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Mexico,

in the Memorial:

"For these reasons, . . . the Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;

(2) that the obligation in Article 36 (1) of the Vienna Convention requires notification before the competent authorities of the receiving State interrogate the foreign national or take any other action potentially detrimental to his or her rights;

(3) that the United States, in applying the doctrine of procedural default, or any other doctrine of its

municipal law, to preclude the exercise and review of the rights afforded by Article 36 of the Vienna Convention, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to *restitutio in integrum* and the United States therefore is under an obligation to restore the *status quo ante*, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations, specifically by, among other things,

(a) vacating the convictions of the fifty-four Mexican nationals;

(b) vacating the sentences of the fifty-four Mexican nationals;

(c) excluding any subsequent proceedings against the fifty-four Mexican nationals any statements and confessions obtained from them prior to notification of their rights to consular notification and access;

(d) the application of any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his rights under the Convention;

(e) preventing the application of any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(f) preventing the application of any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

(2) United States, in light of the regular and continuous violations set forth in Mexico's Application and Memorial, is under an obligation to take all legislative, executive, and judicial steps necessary to:

(a) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease;

(b) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations;

(c) that its judicial authorities cease applying, and guarantee that in the future they will not apply:

(i) any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention;

(ii) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(iii) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here."

On behalf of the Government of the United States,

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, the Government of the United States of America

requests that the Court adjudge and declare that the claims of the United Mexican States are dismissed."

14. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Mexico,

"The Government of Mexico respectfully requests the Court to adjudge and declare

(1) That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention;

(2) That the obligation in Article 36 (1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights;

(3) That the United States of America violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convic-

tions and sentences impaired by a violation of Article 36 (1); by substituting for such review and reconsideration clemency proceedings; and by applying the "procedural default" doctrine and other municipal law doctrines that fail to attach legal significance to an Article 36 (1) violation on its own terms;

(4) That pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for those injuries in the form of *restitutio in integrum*;

(5) That this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;

(6) That this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;

(7) That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and

(8) That the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to

achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

On behalf of the Government of the United States,

> "On the basis of the facts and arguments made by the United States in its Counter-Memorial and in these proceedings, the Government of the United States of America requests that the Court, taking into account that the United States has conformed its conduct to this Court's Judgment in the *LaGrand Case (Germany v. United States of America)*, not only with respect to German nationals but, consistent with the Declaration of the President of the Court in that case, to all detained foreign nationals, adjudge and declare that the claims of the United Mexican States are dismissed."

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15. The present proceedings have been brought by Mexico against the United States on the basis of the Vienna Convention, and of the Optional Protocol providing for the jurisdiction of the Court over "disputes arising out of the interpretation or application" of the Convention. Mexico and the United States are, and were at all relevant times, parties to the Vienna Convention and to the Optional Protocol. Mexico claims that the United States has committed breaches of the Vienna Convention in relation to the treatment of a number of Mexican nationals who have been tried, convicted and sentenced to death in criminal proceedings in the United States. The original claim related to 54 such persons, but as a result of subsequent adjustments to its claim made by Mexico (see paragraph 7 above), only 52 individual

cases are involved. These criminal proceedings have been taking place in nine different States of the United States, namely California (28 cases), Texas (15 cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case) and Oregon (one case), between 1979 and the present.

16. For convenience, the names of the 52 individuals, and the numbers by which their cases will be referred to, are set out below:

1. Carlos Avena Guillen
2. Héctor Juan Ayala
3. Vicente Benavides Figueroa
4. Constantino Carrera Montenegro
5. Jorge Contreras López
6. Daniel Covarrubias Sánchez
7. Marcos Esquivel Barrera
8. Rubén Gómez Pérez
9. Jaime Armando Hoyos
10. Arturo Juárez Suárez
11. Juan Manuel López
12. José Lupercio Casares
13. Luis Alberto Maciel Hernández
14. Abelino Manríquez Jáquez
15. Omar Fuentes Martínez
    (a.k.a. Luis Aviles de la Cruz)
16. Miguel Angel Martínez Sánchez
17. Martín Mendoza García
18. Sergio Ochoa Tamayo
19. Enrique Parra Dueñas
20. Juan de Dios Ramírez Villa
21. Magdaleno Salazar
22. Ramón Salcido Bojórquez
23. Juan Ramón Sánchez Ramírez
24. Ignacio Tafoya Arriola

25. Alfredo Valdez Reyes
26. Eduardo David Vargas
27. Tomás Verano Cruz
28. [Case withdrawn]
29. Samuel Zamudio Jiménez
30. Juan Carlos Alvarez Banda
31. César Roberto Fierro Reyna
32. Héctor García Torres
33. Ignacio Gómez
34. Ramiro Hernández Llanas
35. Ramiro Rubí Ibarra
36. Humberto Leal García
37. Virgilio Maldonado
38. José Ernesto Medellín Rojas
39. Roberto Moreno Ramos
40. Daniel Angel Plata Estrada
41. Rubén Ramírez Cárdenas
42. Félix Rocha Díaz
43. Oswaldo Regalado Soriano
44. Edgar Arias Tamayo
45. Juan Caballero Hernández
46. Mario Flores Urbán
47. Gabriel Solache Romero
48. Martín Raúl Fong Soto
49. Rafael Camargo Ojeda
50. [Case withdrawn]
51. Carlos René Pérez Gutiérrez
52. José Trinidad Loza
53. Osvaldo Netzahualcóyotl Torres Aguilera
54. Horacio Alberto Reyes Camarena

17. The provisions of the Vienna Convention of which Mexico alleges violations are contained in Article 36. Paragraphs 1 and 2 of this Article are set out respectively in paragraphs 50 and 108 below. Article 36

relates, according to its title, to "Communication and contact with nationals of the sending State". Paragraph 1 *(b)* of that Article provides that if a national of that State "is arrested or committed to prison or to custody pending trial or is detained in any other manner", and he so requests, the local consular post of the sending State is to be notified. The Article goes on to provide that the "competent authorities of the receiving State" shall "inform the person concerned without delay of his rights" in this respect. Mexico claims that in the present case these provisions were not complied with by the United States authorities in respect of the 52 Mexican nationals the subject of its claims. As a result, the United States has according to Mexico committed breaches of paragraph 1 *(b)*; moreover, Mexico claims, for reasons to be explained below (see paragraphs 98 *et seq.*), that the United States is also in breach of paragraph 1 *(a)* and *(c)* and of paragraph 2 of Article 36, in view of the relationship of these provisions with paragraph 1 *(b)*.

18. As regards the terminology employed to designate the obligations incumbent upon the receiving State under Article 36, paragraph 1 *(b)*, the Court notes that the Parties have used the terms "inform" and "notify" in differing senses. For the sake of clarity, the Court, when speaking in its own name in the present Judgment, will use the word "inform" when referring to an individual being made aware of his rights under that subparagraph and the word "notify" when referring to the giving of notice to the consular post.

19. The underlying facts alleged by Mexico may be briefly described as follows: some are conceded by the United States, and some disputed. Mexico states that all the individuals the subject of its claims were Mexican nationals at the time of their arrest. It further contends

that the United States authorities that arrested and interrogated these individuals had sufficient information at their disposal to be aware of the foreign nationality of those individuals. According to Mexico's account, in 50 of the specified cases, Mexican nationals were never informed by the competent United States authorities of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention and, in the two remaining cases, such information was not provided "without delay", as required by that provision. Mexico has indicated that in 29 of the 52 cases its consular authorities learned of the detention of the Mexican nationals only after death sentences had been handed down. In the 23 remaining cases, Mexico contends that it learned of the cases through means other than notification to the consular post by the competent United States authorities under Article 36, paragraph 1 *(b)*. It explains that in five cases this was too late to affect the trials, that in 15 cases the defendants had already made incriminating statements, and that it became aware of the other three cases only after considerable delay.

20. Of the 52 cases referred to in Mexico's final submissions, 49 are currently at different stages of the proceedings before United States judicial authorities at state or federal level, and in three cases, those of Mr. Fierro (case No. 31), Mr. Moreno (case No. 39) and Mr. Torres (case No. 53), judicial remedies within the United States have already been exhausted. The Court has been informed of the variety of types of proceedings and forms of relief available in the criminal justice systems of the United States, which can differ from state to state. In very general terms, and according to the description offered by both Parties in their pleadings, it appears that the 52 cases may be classified into three categories: 24 cases which are currently in direct appeal; 25 cases in

which means of direct appeal have been exhausted, but post-conviction relief *(habeas corpus)*, either at State or at federal level, is still available; and three cases in which no judicial remedies remain. The Court also notes that, in at least 33 cases, the alleged breach of the Vienna Convention was raised by the defendant either during pre-trial, at trial, on appeal or in *habeas corpus* proceedings, and that some of these claims were dismissed on procedural or substantive grounds and others are still pending. To date, in none of the 52 cases have the defendants had recourse to the clemency process.

21. On 9 January 2003, the day on which Mexico filed its Application and a request for the indication of provisional measures, all 52 individuals the subject of the claims were on death row. However, two days later the Governor of the State of Illinois, exercising his power of clemency review, commuted the sentences of all convicted individuals awaiting execution in that State, including those of three individuals named in Mexico's Application (Mr. Caballero (case No. 45), Mr. Flores (case No. 46) and Mr. Solache (case No. 47)). By a letter dated 20 January 2003, Mexico informed the Court that, further to that decision, it withdrew its request for the indication of provisional measures on behalf of these three individuals, but that its Application remained unchanged. In the Order of 5 February 2003, mentioned in paragraph 3 above, on the request by Mexico for the indication of provisional measures, the Court considered that it was apparent from the information before it that the three Mexican nationals named in the Application who had exhausted all judicial remedies in the United States (see paragraph 20 above) were at risk of execution in the following months, or even weeks. Consequently, it ordered by way of provisional measure that the United States take all measures necessary to ensure that these

individuals would not be executed pending final judgment in these proceedings. The Court notes that, at the date of the present Judgment, these three individuals have not been executed, but further notes with great concern that, by an Order dated 1 March 2004, the Oklahoma Court of Criminal Appeals has set an execution date of 18 May 2004 for Mr. Torres.

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The Mexican objection to the United States objections to jurisdiction and admissibility

22. As noted above, the present dispute has been brought before the Court by Mexico on the basis of the Vienna Convention and the Optional Protocol to that Convention. Article I of the Optional Protocol provides:

> "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

23. The United States has presented a number of objections to the jurisdiction of the Court, as well as a number of objections to the admissibility of the claims advanced by Mexico. It is however the contention of Mexico that all the objections raised by the United States are inadmissible as having been raised after the expiration of the time-limit laid down by the Rules of Court. Mexico draws attention to the text of Article 79, para-

graph 1, of the Rules of Court as amended in 2000, which provides that

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial."

The previous text of this paragraph required objections to be made "within the time-limit fixed for delivery of the Counter-Memorial". In the present case the Memorial of Mexico was filed on 23 June 2003; the objections of the United States to jurisdiction and admissibility were presented in its Counter-Memorial, filed on 3 November 2003, more than four months later.

24. The United States has observed that, during the proceedings on the request made by Mexico for the indication of provisional measures in this case, it specifically reserved its right to make jurisdictional arguments at the appropriate stage, and that subsequently the Parties agreed that there should be a single round of pleadings. The Court would however emphasize that parties to cases before it cannot, by purporting to "reserve their rights" to take some procedural action, exempt themselves from the application to such action of the provisions of the Statute and Rules of Court (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 338, para. 28).

The Court notes, however, that Article 79 of the Rules applies only to preliminary objections, as is indicated by

the title of the subsection of the Rules which it constitutes. As the Court observed in the *Lockerbie* cases, "if it is to be covered by Article 79, an objection must . . . possess a 'preliminary' character," and "Paragraph 1 of Article 79 of the Rules of Court characterizes as 'preliminary' an objection 'the decision upon which is requested before any further proceedings'" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, I.C.J. Reports 1998*, p. 26, para. 47; p. 131, para. 46); and the effect of the timely presentation of such an objection is that the proceedings on the merits are suspended (paragraph 5 of Article 79). An objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible. There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits. That is indeed what the United States has done in this case; and, for reasons to be indicated below, many of its objections are of such a nature that they would in any event probably have had to be heard along with the merits. The Court concludes that it should not exclude from consideration the objections of the United States to jurisdiction and admissibility by reason of the fact that they were not presented within three months from the date of filing of the Memorial.

25. The United States has submitted four objections to the jurisdiction of the Court, and five to the admissibility of the claims of Mexico. As noted above, these have not been submitted as preliminary objections under Article 79 of the Rules of Court; and they are not of such a nature that the Court would be required to examine and dispose of all of them *in limine*, before dealing with any aspect of the merits of the case. Some are expressed to be only addressed to certain claims; some are addressed to questions of the remedies to be indicated if the Court finds that breaches of the Vienna Convention have been committed; and some are of such a nature that they would have to be dealt with along with the merits. The Court will however now examine each of them in turn.

* *

United States objections to jurisdiction

26. The United States contends that the Court lacks jurisdiction to decide many of Mexico's claims, inasmuch as Mexico's submissions in the Memorial asked the Court to decide questions which do not arise out of the interpretation or application of the Vienna Convention, and which the United States has never agreed to submit to the Court.

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27. By its first jurisdictional objection, the United States suggested that the Memorial is fundamentally addressed to the treatment of Mexican nationals in the federal and state criminal justice systems of the United States, and the operation of the United States criminal justice system as a whole. It suggested that Mexico's

invitation to the Court to make what the United States regards as "far-reaching and unsustainable findings concerning the United States criminal justice systems" would be an abuse of the Court's jurisdiction. At the hearings, the United States contended that Mexico is asking the Court to interpret and apply the treaty as if it were intended principally to govern the operation of a State's criminal justice system as it affects foreign nationals.

28. The Court would recall that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts. How far it may do so in the present case is a matter for the merits. The first objection of the United States to jurisdiction cannot therefore be upheld.

29. The second jurisdictional objection presented by the United States was addressed to the first of the submissions presented by Mexico in its Memorial (see para-

graph 13 above). The United States pointed out that Article 36 of the Vienna Convention "creates no obligations constraining the rights of the United States to arrest a foreign national"; and that similarly the "detaining, trying, convicting and sentencing" of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification. The United States deduced from this that the matters raised in Mexico's first submission are outside the jurisdiction of the Court under the Vienna Convention and the Optional Protocol, and it maintains this objection in response to the revised submission, presented by Mexico at the hearings, whereby it asks the Court to adjudge and declare:

> "That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention."

30. This issue is a question of interpretation of the obligations imposed by the Vienna Convention. It is true that the only obligation of the receiving State toward a foreign national that is specifically enunciated by Article 36, paragraph 1 *(b)*, of the Vienna Convention is to inform such foreign national of his rights, when he is

"arrested or committed to prison or to custody pending trial or is detained in any other manner"; the text does not restrain the receiving State from "arresting, detaining, trying, convicting, and sentencing" the foreign national, or limit its power to do so. However, as regards the detention, trial, conviction and sentence of its nationals, Mexico argues that depriving a foreign national facing criminal proceedings of consular notification and assistance renders those proceedings fundamentally unfair. Mexico explains in this respect that:

> "Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled",

and that "It is therefore an essential requirement for fair criminal proceedings against foreign nationals." In Mexico's contention, "consular notification has been widely recognized as a fundamental due process right, and indeed, a human right". On this basis it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that those nationals have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". Consequently, in the contention of Mexico, "the integrity of these proceedings has been hopelessly undermined, their outcomes rendered irrevocably unjust". For Mexico to contend, on this basis, that not merely the failure to notify, but the arrest, detention, trial and conviction of its nationals were unlawful is to argue in favour of a particular interpretation of the Vienna Convention. Such an interpretation may or may not be confirmed on the merits, but is not excluded from

the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention. The second objection of the United States to jurisdiction cannot therefore be upheld.

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31. The third objection by the United States to the jurisdiction of the Court refers to the first of the submissions in the Mexican Memorial concerning remedies. By that submission, which was confirmed in substance in the final submissions, Mexico claimed that

> "Mexico is entitled to *restitutio in integrum*, and the United States therefore is under an obligation to restore the *status quo ante*, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations . . ."

On that basis, Mexico went on in its first submission to invite the Court to declare that the United States was bound to vacate the convictions and sentences of the Mexican nationals concerned, to exclude from any subsequent proceedings any statements and confessions obtained from them, to prevent the application of any procedural penalty for failure to raise a timely defence on the basis of the Convention, and to prevent the application of any municipal law rule preventing courts in the United States from providing a remedy for the violation of Article 36 rights.

32. The United States objects that so to require specific acts by the United States in its municipal criminal

justice systems would intrude deeply into the independence of its courts; and that for the Court to declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction. The Court, the United States claims, has no jurisdiction to review appropriateness of sentences in criminal cases, and even less to determine guilt or innocence, matters which only a court of criminal appeal could go into.

33. For its part, Mexico points out that the United States accepts that the Court has jurisdiction to interpret the Vienna Convention and to determine the appropriate form of reparation under international law. In Mexico's view, these two considerations are sufficient to defeat the third objection to jurisdiction of the United States.

34. For the same reason as in respect of the second jurisdictional objection, the Court is unable to uphold the contention of the United States that, even if the Court were to find that breaches of the Vienna Convention have been committed by the United States of the kind alleged by Mexico, it would still be without jurisdiction to order *restitutio in integrum* as requested by Mexico. The Court would recall in this regard, as it did in the *LaGrand* case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation (*I.C.J. Reports 2001*, p. 485, para. 48). Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute. The third objection of the United States to jurisdiction cannot therefore be upheld.

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35. The fourth and last jurisdictional objection of the United States is that "the Court lacks jurisdiction to determine whether or not consular notification is a 'human right', or to declare fundamental requirements of substantive or procedural due process". As noted above, it is on the basis of Mexico's contention that the right to consular notification has been widely recognized as a fundamental due process right, and indeed a human right, that it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that they have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". The Court observes that Mexico has presented this argument as being a matter of interpretation of Article 36, paragraph 1 *(b)*, and therefore belonging to the merits. The Court considers that this is indeed a question of interpretation of the Vienna Convention, for which it has jurisdiction; the fourth objection of the United States to jurisdiction cannot therefore be upheld.

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United States objections to admissibility

36. In its Counter-Memorial, the United States has advanced a number of arguments presented as objections to the admissibility of Mexico's claims. It argues that

"Before proceeding, the Court should weigh whether characteristics of the case before it today, or special circumstances related to particular claims, render either the entire case, or particular claims, inappropriate for further consideration and decision by the Court."

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37. The first objection under this head is that "Mexico's submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal"; there is, in the view of the United States, "no other apt characterization of Mexico's two submissions in respect of remedies". The Court notes that this contention is addressed solely to the question of remedies. The United States does not contend on this ground that the Court should decline jurisdiction to enquire into the question of breaches of the Vienna Convention at all, but simply that, if such breaches are shown, the Court should do no more than decide that the United States must provide "review and reconsideration" along the lines indicated in the Judgment in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 513-514, para. 125). The Court notes that this is a matter of merits. The first objection of the United States to admissibility cannot therefore be upheld.

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38. The Court now turns to the objection of the United States based on the rule of exhaustion of local remedies. The United States contends that the Court "should find inadmissible Mexico's claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies". It asserts that in a number of the cases the subject of Mexico's claims, the detained Mexican national, even with the benefit of the provision of Mexican consular assistance, failed to raise the alleged non-compliance with Article 36, paragraph 1, of the Vienna Convention at the trial. Furthermore, it contends that all of the claims relating to cases referred to in the Mexican Memorial are inadmissible because

local remedies remain available in every case. It has drawn attention to the fact that litigation is pending before courts in the United States in a large number of the cases the subject of Mexico's claims and that, in those cases where judicial remedies have been exhausted, the defendants have not had recourse to the clemency process available to them; from this it concludes that none of the cases "is in an appropriate posture for review by an international tribunal".

39. Mexicoresponds that the rule of exhaustion of local remedies cannot preclude the admissibility of its claims. It first states that a majority of the Mexican nationals referred to in paragraph 16 above have sought judicial remedies in the United States based on the Vienna Convention and that their claims have been barred, notably on the basis of the procedural default doctrine. In this regard, it quotes the Court's statement in the *LaGrand* case that "the United States may not . . . rely before this Court on this fact in order to preclude the admissibility of Germany's [claim] . . . , as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers" (*I.C.J. Reports 2001*, p. 488, para. 60). Further, in respect of the other Mexican nationals, Mexico asserts that

> "the courts of the United States have never granted a judicial remedy to any foreign national for a violation of Article 36. The United States courts hold either that Article 36 does not create an individual right, or that a foreign national who has been denied his Article 36 rights but given his constitutional and statutory rights, cannot establish prejudice and therefore cannot get relief."

It concludes that the available judicial remedies are thus ineffective. As for clemency procedures, Mexico contends that they cannot count for purposes of the rule of exhaustion of local remedies, because they are not a judicial remedy.

40. In its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals".

The Court would first observe that the individual rights of Mexican nationals under subparagraph 1 *(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.

In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that *it has itself suffered, directly and through its nationals*, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 *(a)*, *(b)* and *(c)*.

The Court would recall that, in the *LaGrand* case, it recognized that "Article 36, paragraph 1 [of the Vienna Convention], creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State of the detained person" (*I.C.J. Reports 2001*, p. 494, para. 77). It would further observe that

violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 *(b)*. The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule, as explained by Mexico in paragraph 39 above, the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld.

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41. The Court now turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. This question is raised by the United States by way of an objection to the admissibility of those claims: the United States contends that in its Memorial Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The United States regards it as an accepted principle that, when a person arrested or detained in the receiving State is a national of that State,

then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities of the receiving State are not required to proceed as laid down in that Article; and Mexico has indicated that, for the purposes of the present case it does not contest that dual nationals have no right to be advised of their rights under Article 36.

42. It has however to be recalled that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits. A claim may be made by Mexico of breach of Article 36 of the Vienna Convention in relation to any of its nationals, and the United States is thereupon free to show that, because the person concerned was also a United States national, Article 36 had no application to that person, so that no breach of treaty obligations could have occurred. Furthermore, as regards the claim to exercise diplomatic protection, the question whether Mexico is entitled to protect a person having dual Mexican and United States nationality is subordinated to the question whether, in relation to such a person, the United States was under any obligation in terms of Article 36 of the Vienna Convention. It is thus in the course of its examination of the merits that the Court will have to consider whether the individuals concerned, or some of them, were dual nationals in law. Without prejudice to the outcome of such examination, the third objection of the United States to admissibility cannot therefore be upheld.

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43. The Court now turns to the fourth objection advanced by the United States to the admissibility of Mexico's claims: the contention that "The Court should not permit Mexico to pursue a claim against the United States with respect to any individual case where Mexico had actual knowledge of a breach of the [Vienna Convention] but failed to bring such breach to the attention of the United States or did so only after considerable delay." In the Counter-Memorial, the United States advances two considerations in support of this contention: that if the cases had been mentioned promptly, corrective action might have been possible; and that by inaction Mexico created an impression that it considered that the United States was meeting its obligations under the Convention, as Mexico understood them. At the hearings, the United States suggested that Mexico had in effect waived its right to claim in respect of the alleged breaches of the Convention, and to seek reparation.

44. As the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, "delay on the part of a claimant State may render an application inadmissible", but "international law does not lay down any specific time-limit in that regard" (*I.C.J. Reports 1992*, pp. 253-254, para. 32). In that case the Court recognized that delay might prejudice the respondent State "with regard to both the establishment of the facts and the determination of the content of the applicable law" (*ibid.*, p. 255, para. 36), but it has not been suggested that there is any such risk of prejudice in the present case. So far as inadmissibility might be based on an implied waiver of rights, the Court considers that only a much more prolonged and consistent inaction on the part of Mexico than any that the United States has alleged might be interpreted as implying such a waiver. Furthermore, Mexico indicated a number of ways in which

it brought to the attention of the United States the breaches which it perceived of the Vienna Convention. The fourth objection of the United States to admissibility cannot therefore be upheld.

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45. The Court has now to examine the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The United States contends that, in accordance with basic principles of administration of justice and the equality of States, both litigants are to be held accountable to the same rules of international law. The objection in this regard was presented in terms of the interpretation of Article 36 of the Vienna Convention, in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other (*Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 20).

46. The Court would recall that the United States had already raised an objection of a similar nature before it in the *LaGrand* case; there, the Court held that it need not decide "whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions", since the United States had failed to prove that Germany's own practice did not conform to the standards it was demanding from the United States (*I.C.J. Reports 2001*, p. 489, para. 63).

47. The Court would recall that it is in any event essential to have in mind the nature of the Vienna Con-

vention. It lays down certain standards to be observed by all States parties, with a view to the "unimpeded conduct of consular relations", which, as the Court observed in 1979, is important in present-day international law "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim. The fifth objection of the United States to admissibility cannot therefore be upheld.

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48. Having established that it has jurisdiction to entertain Mexico's claims and that they are admissible, the Court will now turn to the merits of those claims.

* *

Article 36, paragraph 1

49. In its final submissions Mexico asks the Court to adjudge and declare that,

> "the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mex-

ican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention".

50. The Court has already in its Judgment in the *LaGrand* case described Article 36, paragraph 1, as "an interrelated régime designed to facilitate the implementation of the system of consular protection" (*I.C.J. Reports 2001*, p. 492, para. 74). It is thus convenient to set out the entirety of that paragraph.

"With a view toward facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular

post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

51. The United States as the receiving State does not deny its duty to perform these obligations. However, it claims that the obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends *inter alia* that it has not committed any breach of Article 36, paragraph 1 *(b)*, upon the proper interpretation of "without delay" as used in that subparagraph.

52. Thus two major issues under Article 36, paragraph 1 *(b)*, that are in dispute between the Parties are, first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay". The Court will examine each of these in turn.

53. The Parties have advanced their contentions as to nationality in three different legal contexts. The United

States has begun by making an objection to admissibility, which the Court has already dealt with (see paragraphs 41 and 42 above). The United States has further contended that a substantial number of the 52 persons listed in paragraph 16 above were United States nationals and that it thus had no obligation to these individuals under Article 36, paragraph 1 *(b)*. The Court will address this aspect of the matter in the following paragraphs. Finally, the Parties disagree as to whether the requirement under Article 36, paragraph 1 *(b)*, for the information to be given "without delay" becomes operative upon arrest or upon ascertainment of nationality. The Court will address this issue later (see paragraph 63 below).

54. The Parties disagree as to what each of them must show as regards nationality in connection with the applicability of the terms of Article 36, paragraph 1, and as to how the principles of evidence have been met on the facts of the cases.

55. Both Parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Mexico acknowledges that it has the burden of proof to show that the 52 persons listed in paragraph 16 above were Mexican nationals to whom the provisions of Article 36, paragraph 1 *(b)*, in principle apply. It claims it has met this burden by providing to the Court the birth certificates of these nationals, and declarations from 42 of them that they have not acquired U.S. nationality. Mexico further contends that the burden of proof lies on the United States should it

wish to contend that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals.

56. The United States accepts that in such cases it has the burden of proof to demonstrate United States nationality, but contends that nonetheless the "burden of evidence" as to this remains with Mexico. This distinction is explained by the United States as arising out of the fact that persons of Mexican nationality may also have acquired United States citizenship by operation of law, depending on their parents' dates and places of birth, places of residency, marital status at time of their birth and so forth. In the view of the United States "virtually all such information is in the hands of Mexico through the now 52 individuals it represents". The United States contends that it was the responsibility of Mexico to produce such information, which responsibility it has not discharged.

57. The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States.

The Court observes further that the United States has, however, questioned whether some of these individuals were not also United States nationals. Thus, the United States has informed the Court that, "in the case of defendant Ayala (case No. 2) we are close to certain that Ayala is a United States citizen", and that this could be confirmed with absolute certainty if Mexico produced facts about this matter. Similarly Mr. Avena (case No. 1) was said to be "likely" to be a United States citizen, and there was "some possibility" that some 16 other defen-

dants were United States citizens. As to six others, the United States said it "cannot rule out the possibility" of United States nationality. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have sought that information from the Mexican authorities. The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals.

The Court therefore finds that, as regards the 52 persons listed in paragraph 16 above, the United States had obligations under Article 36, paragraph 1 *(b)*.

58. Mexico asks the Court to find that

> "the obligation in Article 36, paragraph 1, of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights".

59. Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 *(b)*, "without delay". It alleges that in one case, Mr. Esquivel (case No. 7), the arrested person was informed, but only some 18 months after the arrest, while in another, that of Mr. Juárez (case No. 10), information was given to the arrested person of his rights some 40 hours after arrest. Mexico contends that this still constituted a violation, because "without delay" is to be understood as meaning "immediately", and in any event before any interrogation occurs. Mexico further draws the Court's attention to the fact that in this case a United States court found that there had been a violation of Article 36, paragraph 1 *(b)*, and claims that the United States cannot disavow such a determination by its own courts. In an Annex to its Memorial, Mexico mentions that, in a third case (Mr. Ayala, case No. 2), the accused was informed of his rights upon his arrival on death row, some four years after arrest. Mexico contends that in the remaining cases the Mexicans concerned were in fact never so informed by the United States authorities.

60. The United States disputes both the facts as presented by Mexico and the legal analysis of Article 36, paragraph 1 *(b)*, of the Vienna Convention offered by Mexico. The United States claims that Mr. Solache (case No. 47) was informed of his rights under the Vienna Convention some seven months after his arrest. The United States further claims that many of the persons concerned were of United States nationality and that at least seven of these individuals "appear to have affirmatively claimed to be United States citizens at the time of their arrest". These cases were said to be those of Avena (case No. 1), Ayala (case No. 2), Benavides (case

No. 3), Ochoa (case No. 18), Salcido (case No. 22), Tafoya (case No. 24), and Alvarez (case No. 30). In the view of the United States no duty of consular information arose in these cases. Further, in the contention of the United States, in the cases of Mr. Ayala (case No. 2) and Mr. Salcido (case No. 22) there was no reason to believe that the arrested persons were Mexican nationals at any stage; the information in the case of Mr. Juárez (case No. 10) was given "without delay".

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 *(b)*, having found in paragraph 57 above that it is applicable to the 52 persons listed in paragraph 16. It begins by noting that Article 36, paragraph 1 *(b)*, contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 *(b)*; the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.

62. The third element of Article 36, paragraph 1 *(b)*, has not been raised on the facts before the Court. The Court thus begins with the right of an arrested or detained individual to information.

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 *(b)*, information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, *Consular Notification and Access — Instructions for Federal, State and Local Law Enforcement and Other*

Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, issued to federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: "most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality." The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.

64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a multicultural society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 *(b)*, would be greatly enhanced. The provision of

such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the "Miranda rule"; these rights include, *inter alia*, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.

65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph 1 *(b)*, of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what inquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court.

66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of

consular information "without delay". Mexico has accordingly not shown that in the case of Mr. Salcido the United States violated its obligations under Article 36, paragraph 1 *(b)*.

67. In the case of Mr. Ayala (case No. 2), while he was identified in a court record in 1989 (three years after his arrest) as a United States citizen, there is no evidence to show this Court that the accused did indeed claim upon his arrest to be a United States citizen. The Court has not been informed of any enquiries made by the United States to confirm these assertions of United States nationality.

68. In the five other cases listed by the United States as cases where the individuals "appear to have affirmatively claimed to be United States citizens at the time of their arrest", no evidence has been presented that such a statement was made at the time of arrest.

69. Mr. Avena (case No. 1) is listed in his arrest report as having been born in California. His prison records describe him as of Mexican nationality. The United States has not shown the Court that it was engaged in enquiries to confirm United States nationality.

70. Mr. Benavides (case No. 3) was carrying an Immigration and Naturalization Service immigration card at the time of arrest in 1991. The Court has not been made aware of any reason why the arresting authorities should nonetheless have believed at the time of arrest that he was a United States national. The evidence that his defence counsel in June 1993 informed the court that Mr. Benavides had become a United States citizen is irrelevant to what was understood as to his nationality at time of arrest.

71. So far as Mr. Ochoa is concerned (case No. 18), the Court observes that his arrest report in 1990 refers to him as having been born in Mexico, an assertion that is repeated in a second police report. Some two years later details in his court record refer to him as a United States citizen born in Mexico. The Court is not provided with any further details. The United States has not shown this Court that it was aware of, or was engaged in active enquiry as to, alleged United States nationality at the time of his arrest.

72. Mr. Tafoya (case No. 24) was listed on the police booking sheet as having been born in Mexico. No further information is provided by the United States as to why this was done and what, if any, further enquiries were being made concerning the defendant's nationality.

73. Finally, the last of the seven persons referred to by the United States in this group, Mr. Alvarez (case No. 30), was arrested in Texas on 20 June 1998. Texas records identified him as a United States citizen. Within three days of his arrest, however, the Texas authorities were informed that the Immigration and Naturalization Service was holding investigations to determine whether, because of a previous conviction, Mr. Alvarez was subject to deportation as a foreign national. The Court has not been presented with evidence that rapid resolution was sought as to the question of Mr. Alvarez's nationality.

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 *(b)*, in the case of Mr. Salcido (case No. 22), and his case will not be further commented upon. On the other hand, as regards the other individuals who are alleged to have claimed United States nationality on arrest, whose cases have been con-

sidered in paragraphs 67 to 73 above, the argument of the United States cannot be upheld.

75. The question nonetheless remains as to whether, in each of the 45 cases referred to in paragraph 65 and of the six cases mentioned in paragraphs 67 to 73, the United States did provide the required information to the arrested persons "without delay". It is to that question that the Court now turns.

76. The Court has been provided with declarations from a number of the Mexican nationals concerned that attest to their never being informed of their rights under Article 36, paragraph 1 *(b)*. The Court at the outset notes that, in 47 such cases, the United States nowhere challenges this fact of information not being given. Nevertheless, in the case of Mr. Hernández (case No. 34), the United States observes that

> "Although the [arresting] officer did not ask Hernández Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest."

The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 *(b)*, does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 47 cases, the duty to inform "without delay" has been violated.

77. In four cases, namely Ayala (case No. 2), Esquivel (case No. 7), Juárez (case No. 10) and Solache (case No. 47), some doubts remain as to whether the information that was given was provided without delay. For these, some examination of the term is thus necessary.

78. This is a matter on which the Parties have very different views. According to Mexico, the timing of the notice to the detained person "is critical to the exercise of the rights provided by Article 36" and the phrase "without delay" in paragraph 1 *(b)* requires "unqualified immediacy". Mexico further contends that, in view of the object and purpose of Article 36, which is to enable "meaningful consular assistance" and the safeguarding of the vulnerability of foreign nationals in custody,

> "consular notification . . . must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights".

79. Thus, in Mexico's view, it would follow that in any case in which a foreign national was interrogated before being informed of his rights under Article 36, there would *ipso facto* be a breach of that Article, however rapidly after the interrogation the information was given to the foreign national. Mexico accordingly includes the case of Mr. Juárez among those where it claims violation of Article 36, paragraph 1 *(b)*, as he was interrogated before being informed of his consular rights, some 40 hours after arrest.

80. Mexico has also invoked the *travaux préparatoires* of the Vienna Convention in support of its interpretation of the requirement that the arrested person be informed "without delay" of the right to ask that the consular post be notified. In particular, Mexico recalled that the phrase proposed to the Conference by the International Law Commission, "without undue delay", was replaced by the United Kingdom proposal to delete the word "undue". The United Kingdom representative had explained that this would avoid the implication that "some delay was permissible" and no delegate had expressed dissent with the USSR and Japanese statements that the result of the amendment would be to require information "immediately".

81. The United States disputed this interpretation of the phrase "without delay". In its view it did not mean "immediately, and before interrogation" and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its *travaux préparatoires*. In the booklet referred to in paragraph 63 above, the State Department explains that "without delay" means "there should be no deliberate delay" and that the required action should be taken "as soon as reasonably possible under the circumstances". It was normally to be expected that "notification to consular officers" would have been made "within 24 to 72 hours of the arrest or detention". The United States further contended that such an interpretation of the words "without delay" would be reasonable in itself and also allow a consistent interpretation of the phrase as it occurs in each of three different occasions in Article 36, paragraph 1 *(b)*. As for the *travaux préparatoires*, they showed only that undue or deliberate delay had been rejected as unacceptable.

82. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

> "The significance of giving consular information to a national is thus limited . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . [It] cannot possibly be fundamental to the criminal justice process."

83. The Court now addresses the question of the proper interpretation of the expression "without delay" in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1 *(b)*, is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase "without delay". Moreover, in the different language versions of the Convention various terms are employed to render the phrases "without delay" in Article 36 and "immediately" in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular

officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation".

86. The Court further notes that, notwithstanding the uncertainties in the *travaux préparatoires*, they too do not support such an interpretation. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest that there is

no suggestion in the *travaux* that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 *(b)*.

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 *(b)*, that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1 *(b)*, is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases cited in paragraph 77 within any of the various time periods suggested by the delegates to the Conference on the Vienna Convention, or by the United States itself (see paragraphs 81 and 86 above). Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juárez (case No. 10), the defendant was informed

of his consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juárez's arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his arrest. It follows that Mr. Juárez's Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression "without delay" (see paragraph 88 above), the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 *(b)*, to inform Mr. Juárez without delay of his consular rights. The Court notes that the same finding was reached by a California Superior Court, albeit on different grounds.

90. The Court accordingly concludes that, with respect to each of the individuals listed in paragraph 16, with the exception of Mr. Salcido (case No. 22; see paragraph 74 above), the United States has violated its obligation under Article 36, paragraph 1 *(b)*, of the Vienna Convention to provide information to the arrested person.

91. As noted above, Article 36, paragraph 1 *(b)*, contains three elements. Thus far, the Court has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court now turns to another aspect of Article 36, paragraph 1 *(b)*. The Court finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 *(b)*, does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The giving of the information is relevant, how-

ever, for satisfying the element in Article 36, paragraph 1 *(b)*, on which the other two elements therein depend.

92. In only two cases has the United States claimed that the arrested person was informed of his consular rights but asked for the consular post not to be notified. These are Mr. Juárez (case No. 10) and Mr. Solache (case No. 47).

93. The Court is satisfied that when Mr. Juárez (case No. 10) was informed of his consular rights 40 hours after his arrest (see paragraph 89) he chose not to have his consular post notified. As regards Mr. Solache (case No. 47), however, it is not sufficiently clear to the Court, on the evidence before it, that he requested that his consular post should not be notified. Indeed, the Court has not been provided with any reasons as to why, if a request of non-notification was made, the consular post was then notified some three months later.

94. In a further three cases, the United States alleges that the consular post was formally notified of the detention of one of its Mexican nationals without prior information to the individual as to his consular rights. These are Mr. Covarrubias (case No. 6), Mr. Hernández (case No. 34) and Mr. Reyes (case No. 54). The United States further contends that the Mexican authorities were contacted regarding the case of Mr. Loza (case No. 52).

95. The Court notes that, in the case of Mr. Covarrubias (case No. 6), the consular authorities learned from third parties of his arrest shortly after it occurred. Some 16 months later, a court-appointed interpreter requested that the consulate intervene in the case prior to trial. It would appear doubtful whether an interpreter can be considered a competent authority for triggering the interrelated provisions of Article 36, paragraph 1 *(b)*, of the

Vienna Convention. In the case of Mr. Reyes (case No. 34), the United States has simply told the Court that an Oregon Department of Justice attorney had advised United States authorities that both the District Attorney and the arresting detective advised the Mexican consular authorities of his arrest. No information is given as to when this occurred, in relation to the date of his arrest. Mr. Reyes did receive assistance before his trial. In these two cases, the Court considers that, even on the hypothesis that the conduct of the United States had no serious consequences for the individuals concerned, it did nonetheless constitute a violation of the obligations incumbent upon the United States under Article 36, paragraph 1 *(b)*.

96. In the case of Mr. Loza (case No. 52), a United States Congressman from Ohio contacted the Mexican Embassy on behalf of Ohio prosecutors, some four months after the accused's arrest, "to enquire about the procedures for obtaining a certified copy of Loza's birth certificate". The Court has not been provided with a copy of the Congressman's letter and is therefore unable to ascertain whether it explained that Mr. Loza had been arrested. The response from the Embassy (which is also not included in the documentation provided to the Court) was passed by the Congressman to the prosecuting attorney, who then asked the Civil Registry of Guadalajara for a copy of the birth certificate. This request made no specific mention of Mr. Loza's arrest. Mexico contends that its consulate was never formally notified of Mr. Loza's arrest, of which it only became aware after he had been convicted and sentenced to death. Mexico includes the case of Mr. Loza among those in which the United States was in breach of its obligation of consular notification. Taking account of all these elements, and in particular of the fact that the Embassy was contacted

four months after the arrest, and that the consular post became aware of the defendant's detention only after he had been convicted and sentenced, the Court concludes that in the case of Mr. Loza the United States violated the obligation of consular notification without delay incumbent upon it under Article 36, paragraph 1 *(b)*.

97. Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 *(b)*.

98. In the first of its final submissions, Mexico also asks the Court to find that the violations it ascribes to the United States in respect of Article 36, paragraph 1 *(b)*, have also deprived "Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention".

99. The relationship between the three subparagraphs of Article 36, paragraph 1, has been described by the Court in its Judgment in the *LaGrand* case (*I.C.J. Judgments 2001*, p. 492, para. 74) as "an interrelated régime". The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. In the *LaGrand* case, the Court found that the failure for 16 years to inform the brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under subparagraphs *(a)* and *(c)*.

100. It is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case.

101. The Court would first recall that, in the case of Mr. Juárez (case No. 10) (see paragraph 93 above), when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph *(a)* or subparagraph *(c)* of Article 36, paragraph 1.

102. In the remaining cases, because of the failure of the United States to act in conformity with Article 36, paragraph 1 *(b)*, Mexico was in effect precluded (in some cases totally, and in some cases for prolonged periods of time) from exercising its right under paragraph 1 *(a)* to communicate with its nationals and have access to them. As the Court has already had occasion to explain, it is immaterial whether Mexico would have offered consular assistance, "or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights" (*I.C.J. Reports 2001*, p. 492, para. 74), which might have been acted upon.

103. The same is true, *pari passu*, of certain rights identified in subparagraph *(c)*: "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him . . ."

104. On the other hand, and on the particular facts of this case, no such generalized answer can be given as regards a further entitlement mentioned in subparagraph *(c)*, namely, the right of consular officers "to arrange for [the] legal representation" of the foreign national. Mexico has laid much emphasis in this litigation upon the

importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide to defence counsel, *inter alia* for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 *(c)*, depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national. In the following cases, the Mexican consular authorities learned of their national's detention in time to provide such assistance, either through notification by United States authorities (albeit belatedly in terms of Article 36, paragraph 1 *(b)*) or through other channels: Benavides (case No. 3); Covarrubias (case No. 6); Esquivel (case No. 7); Hoyos (case No. 9); Mendoza (case No. 17); Ramírez (case No. 20); Sánchez (case No. 23); Verano (case No. 27); Zamudio (case No. 29); Gómez (case No. 33); Hernández (case No. 34); Ramírez (case No. 41); Rocha (case No. 42); Solache (case No. 47); Camargo (case No. 49) and Reyes (case No. 54).

105. In relation to Mr. Manríquez (case No. 14), the Court lacks precise information as to when his consular post was notified. It is merely given to understand that it was two years prior to conviction, and that Mr. Manríquez himself had never been informed of his consular rights. There is also divergence between the Parties in regard to the case of Mr. Fuentes (case No. 15), where Mexico claims it became aware of his detention during

trial and the United States says this occurred during jury selection, prior to the actual commencement of the trial. In the case of Mr. Arias (case No. 44), the Mexican authorities became aware of his detention less than one week before the commencement of the trial. In those three cases, the Court concludes that the United States violated its obligations under Article 36, paragraph 1 *(c)*.

106. On this aspect of the case, the Court thus concludes:

(1) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 *(b)*, of the Vienna Convention to inform detained Mexican nationals of their rights under that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Carrera (case No. 4), Contreras (case No. 5), Covarrubias (case No. 6), Esquivel (case No. 7), Gómez (case No. 8), Hoyos (case No. 9), Juárez (case No. 10), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Mendoza (case No. 17), Ochoa (case No. 18), Parra (case No. 19), Ramírez (case No. 20), Salazar (case No. 21), Sánchez (case No. 23), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Verano (case No. 27), Zamudio (case No. 29), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Gómez (case No. 33), Hernández (case No. 34), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Ramírez (case No. 41), Rocha (case No. 42), Regalado (case No. 43), Arias

(case No. 44), Caballero (case No. 45), Flores (case No. 46), Solache (case No. 47), Fong (case No. 48), Camargo (case No. 49), Pérez (case No. 51), Loza (case No. 52), Torres (case No. 53) and Reyes (case No. 54);

(2) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 *(b)* to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above, except in the cases of Mr. Juárez (No. 10) and Mr. Hernández (No. 34);

(3) that by virtue of its breaches of Article 36, paragraph 1 *(b)*, as described in subparagraph (2) above, the United States also violated the obligation incumbent upon it under Article 36, paragraph 1 *(a)*, of the Vienna Convention to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 *(c)* of that Article regarding the right of consular officers to visit their detained nationals;

(4) that the United States, by virtue of these breaches of Article 36, paragraph 1 *(b)*, also violated the obligation incumbent upon it under paragraph 1 *(c)* of that Article to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: Avena (case No. 1), Ayala (case No. 2), Carrera (case No. 4), Contreras (case No. 5), Gómez (case No. 8), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Ochoa (case No. 18), Parra (case No. 19),

Salazar (case No. 21), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45), Flores (case No. 46), Fong (case No. 48), Pérez (case No. 51), Loza (case No. 52) and Torres (case No. 53).

*

Article 36, paragraph 2

107. In its third final submission Mexico asks the Court to adjudge and declare that "the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)".

108. Article 36, paragraph 2, provides:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

109. In this connection, Mexico has argued that the United States

> "By applying provisions of its municipal law to defeat or foreclose remedies for the violation of

rights conferred by Article 36 — thus failing to provide meaningful review and reconsideration of severe sentences imposed in proceedings that violated Article 36 — . . . has violated, and continues to violate, the Vienna Convention."

More specifically, Mexico contends that:

"The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. *First*, despite this Court's clear analysis in *LaGrand*, U.S. courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36."

110. Against this contention by Mexico, the United States argues that:

"the criminal justice systems of the United States address all errors in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the 'laws and regulations' of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2). And, insofar as a breach of Article 36 (1) has

occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with *LaGrand*."

111. The "procedural default" rule in United States law has already been brought to the attention of the Court in the *LaGrand* case. The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*". The rule requires exhaustion of remedies, *inter alia*, at the state level and before a *habeas corpus* motion can be filed with federal courts. In the *LaGrand* case, the rule in question was applied by United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal.

112. The Court has already considered the application of the "procedural default" rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the *LaGrand* case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case". The Court stated:

"In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and

> sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." (*I.C.J. Reports 2001*, p. 497, para. 90.)

On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (*ibid.*, para. 91). This statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

113. The Court will return to this aspect below, in the context of Mexico's claims as to remedies. For the moment, the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights

accorded under this article are intended", and thus violate paragraph 2 of Article 36. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. However, in none of the cases, save for the three mentioned in paragraph 114 below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the *LaGrand* case, and as explained further in paragraphs 128 and following below. It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

114. By contrast, the Court notes that in the case of three Mexican nationals, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39), and Mr. Torres (case No. 53), conviction and sentence have become final. Moreover, in the case of Mr. Torres the Oklahoma Court of Criminal Appeals has set an execution date (see paragraph 21 above, *in fine*). The Court must therefore conclude that, in relation to these three individuals, the United States is in breach of the obligations incumbent upon it under Article 36, paragraph 2, of the Vienna Convention.

* *

Legal consequences of the breach

115. Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 *(b)*, of the Vienna Convention, the Court now proceeds to the examination of the legal consequences of such a breach and of what legal remedies should be considered for the breach.

116. Mexico in its fourth, fifth and sixth submissions asks the Court to adjudge and declare:

"(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for these injuries in the form of *restitutio in integrum*;

(5) that this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals; [and]

(6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings."

117. In support of its fourth and fifth submissions, Mexico argues that "It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is *restitutio in integrum*", and that "The United States is therefore obliged to take the necessary action to restore the *status quo ante* in respect of Mexico's nationals detained, tried, convicted and sentenced in violation of their internationally rec-

ognized rights". To restore the *status quo ante*, Mexico contends that "restitution here must take the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations", and that "It follows from the very nature of *restitutio* that, when a violation of an international obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system". Mexico therefore asks in its submissions that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded.

118. The United States on the other hand argues:

> "*LaGrand*'s holding calls for the United States to provide, in each case, 'review and reconsideration' that 'takes account of' the violation, not 'review and reversal', not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not . . . 'a precise, concrete, stated result: to re-establish the *status quo ante*'".

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." (*Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21.) What constitutes "reparation in an adequate form" clearly varies depending upon the

concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the "reparation in an adequate form" that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." (*Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

120. In the *LaGrand* case the Court made a general statement on the principle involved as follows:

> "The Court considers in this respect that if the United States, notwithstanding its commitment [to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*], should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth

in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States." (*I.C.J. Reports 2001*, pp. 513-514, para. 125.)

121. Similarly, in the present case the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

123. It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In this regard, Mexico cites the recent Judgment of this Court in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, in which the "Court ordered the cancellation of an arrest warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs". However, the present case has clearly to be distinguished from the *Arrest Warrant* case. In that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (*I.C.J. Reports 2002*, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.

124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not

a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard.

125. For these reasons, Mexico's fourth and fifth submissions cannot be upheld.

126. The reasoning of the Court on the fifth submission of Mexico is equally valid in relation to the sixth submission of Mexico. In elaboration of its sixth submission, Mexico contends that "As an aspect of *restitutio in integrum*, Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded". Mexico argues that "The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations", and on this basis concludes that

> "The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them."

127. The Court does not consider that it is necessary to enter into an examination of the merits of the contention advanced by Mexico that the "exclusionary rule" is "a general principle of law under Article 38(1) (c) of the . . . Statute" of the Court. The issue raised by Mex-

ico in its sixth submission relates to the question of what legal consequences flow from the breach of the obligations under Article 36, paragraph 1 — a question which the Court has already sufficiently discussed above in relation to the fourth and the fifth submissons of Mexico. The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

128. While the Court has rejected the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United States of its international obligations under Article 36 of the Vienna Convention, the fact remains that such breaches have been committed, as the Court has found, and it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations. As has already been observed in paragraph 120, the Court in the *LaGrand* Judgment stated the general principle to be applied in such cases by way of a remedy to redress an injury of this kind (*I.C.J. Reports 2001*, pp. 513-514, para. 125).

129. In this regard, Mexico's seventh submission also asks the Court to adjudge and declare:

> "That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law

rule or doctrine [that fails to attach legal significance to an Article 36 (1) violation] is applied."

130. On this question of "review and reconsideration", the United States takes the position that it has indeed conformed its conduct to the *LaGrand* Judgment. In a further elaboration of this point, the United States argues that "[t]he Court said in *LaGrand* that the choice of means for allowing the review and reconsideration it called for 'must be left' to the United States", but that "Mexico would not leave this choice to the United States but have the Court undertake the review instead and decide at once that the breach requires the conviction and sentence to be set aside in each case".

131. In stating in its Judgment in the *LaGrand* case that "the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence" (*I.C.J. Reports 2001*, p. 516, para. 128; emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" (*I.C.J. Reports 2001*, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

132. The United States argues (1) "that the Court's decision in *LaGrand* in calling for review and reconsideration called for a process to re-examine a convic-

tion and sentence in light of a breach of Article 36"; (2) that "in calling for a process of review, the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand"; and (3) "that the relief Mexico seeks in this case is flatly inconsistent with the Judgment in *LaGrand*: it seeks precisely the award of a substantive outcome that the *LaGrand* Court declined to provide".

133. However, the Court wishes to point out that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is that "If the defendant alleged at trial that *a failure of consular information resulted in harm to a particular right essential to a fair trial*, an appeals court can *review how the lower court handled that claim of prejudice*", but that "*If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints* [i.e., the application of the procedural default rule] on raising that particular claim in direct or collateral judicial appeals" (emphasis added). As a result, a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule (see paragraph 111 above).

134. It is not sufficient for the United States to argue that "[w]hatever label [the Mexican defendant] places on his claim, his right . . . must and will be vindicated if it is raised *in some form* at trial" (emphasis added), and that

> "In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from

> independently asserting *a claim that he was prejudiced because he lacked this critical protection needed for a fair trial.*" (Emphasis added.)

The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution.

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135. Mexico, in the latter part of its seventh submission, has stated that "this obligation [of providing review and reconsideration] cannot be satisfied by means of clemency proceedings". Mexico elaborates this point by arguing first of all that "the United States's reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in *LaGrand*". More specifically, Mexico contends:

> "*First*, it is clear that the Court's direction to the United States in *LaGrand* clearly contemplated that 'review and reconsideration' would be carried out by judicial procedures . . .
>
> *Second*, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights. Accordingly, the Court determined in *LaGrand* that clemency review alone did not constitute the required 'review and reconsideration' . . .

> *Finally*, the Court specified that the United States must 'allow the review and reconsideration of the *conviction and sentence* by taking account of the violation of the rights set forth in the Convention' . . . it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction."

Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: "clemency review is standardless, secretive, and immune from judicial oversight".

Finally, in support of its contention, Mexico argues that

> "the failure of state clemency authorities to pay heed to the intervention of the U.S. Department of State in cases of death-sentenced Mexican nationals refutes the [United States] contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36".

136. Against this contention of Mexico, the United States claims that it "gives 'full effect' to the 'purposes for which the rights accorded under [Article 36, paragraph 1,] are intended' through executive clemency". It argues that "[t]he clemency process . . . is well suited to the task of providing review and reconsideration". The United States explains that "Clemency . . . is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process" and

that "Clemency procedures are an integral part of the existing 'laws and regulations' of the United States through which errors are addressed".

137. Specifically in the context of the present case, the United States contends that the following two points are particularly noteworthy:

> "First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate's attorney and the sending state's consular officer . . . Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims".

138. The Court would emphasize that the "review and reconsideration" prescribed by it in the *LaGrand* case should be effective. Thus it should "tak[e] account of the violation of the rights set forth in [the] Convention" (*I.C.J. Reports 2001*, p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" — a concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under

Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 *(b)*, of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is "the historic remedy for preventing miscarriages

of justice where judicial process has been exhausted" (*Herrera* v. *Collins*, 506 U.S. 390 (1993) at pp. 411-412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001*, p. 514, para. 125).

143. It may be true, as the United States argues, that in a number of cases "clemency in fact results in pardons of convictions as well as commutations of sentences". In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case. The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed

to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

*

144. Finally, the Court will consider the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

> "That the [United States] shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

145. In this respect, Mexico recognizes the efforts by the United States to raise awareness of consular assistance rights, through the distribution of pamphlets and pocket cards and by the conduct of training programmes, and that the measures adopted by the United States to that end were noted by the Court in its decision in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 511-513, paras. 121, 123-124). Mexico, however, notes with regret that "the United States program, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36".

146. In particular, Mexico claims in relation to the violation of the obligations under Article 36, paragraph 1, of the Vienna Convention:

> "*First*, competent authorities of the United States regularly fail to provide the timely notification required by Article 36(1)(b) and thereby to [sic] frustrate the communication and access contemplated by Article 36(1)(a) and the assistance contemplated by Article 36(1)(c). These violations continue notwithstanding the Court's judgment in *LaGrand* and the program described there.
>
> . . . . . .
>
> Mexico has demonstrated, moreover, that the pattern of regular noncompliance continues. During the first half of 2003, Mexico has identified at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights."

Furthermore, in relation to the violation of the obligations under Article 36, paragraph 2, of the Vienna Convention, Mexico claims:

> "*Second*, courts in the United States continue to apply doctrines of procedural default and nonretroactivity that prevent those courts from reaching the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is available for a breach of the obligations of Article 36 . . . Likewise, the United States' reliance on clemency proceedings to meet *LaGrand*'s requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect. Hence, the United

States continues to breach Article 36(2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended."

147. The United States contradicts this contention of Mexico by claiming that "its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results". It contends that Mexico "fails to establish a 'regular and continuing' pattern of breaches of Article 36 in the wake of *LaGrand*".

148. Mexico emphasizes the necessity of requiring the cessation of the wrongful acts because, it alleges, the violation of Article 36 with regard to Mexico and its 52 nationals still continues. The Court considers, however, that Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals referred to in its final submissions; it cannot therefore uphold Mexico's claim seeking cessation. The Court would moreover point out that, inasmuch as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of *pendente lite*; and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention.

149. The Mexican request for guarantees of non-repetition is based on its contention that beyond these 52 cases there is a "regular and continuing" pattern of breaches by the United States of Article 36. In this respect, the Court observes that there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the *LaGrand* Judgment, there remain a substantial num-

ber of cases of failure to carry out the obligation to furnish consular information to Mexican nationals, the Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. Especially at the stage of pre-trial consular information, it is noteworthy that the United States has been making good faith efforts to implement the obligations incumbent upon it under Article 36, paragraph 1, of the Vienna Convention, through such measures as a new outreach programme launched in 1998, including the dissemination to federal, state and local authorities of the State Department booklet mentioned above in paragraph 63. The Court wishes to recall in this context what it has said in paragraph 64 about efforts in some jurisdictions to provide the information under Article 36, paragraph 1 *(b)*, in parallel with the reading of the "Miranda rights".

150. The Court would further note in this regard that in the *LaGrand* case Germany sought, *inter alia*, "a straightforward assurance that the United States will not repeat its unlawful acts" (*I.C.J. Reports 2001*, p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

> "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article

> 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, must be regarded as meeting Germany's request for a general assurance of non-repetition." (*I.C.J. Reports 2001*, pp. 512-513, para. 124.)

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the *LaGrand* Judgment remains applicable, and therefore meets that request.

*

* *

151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the

viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

* *

152. By its Order of 5 February 2003 the Court, acting on a request by Mexico, indicated by way of provisional measure that "The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings" (*I.C.J. Reports 2003*, pp. 91-92, para. 59 (I)) (see paragraph 21 above). The Order of 5 February 2003, according to its terms and to Article 41 of the Statute, was effective pending final judgment, and the obligations of the United States in that respect are, with effect from the date of the present Judgment, replaced by those declared in this Judgment. The Court has rejected Mexico's submission that, by way of *restitutio in integrum*, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims (see above, paragraphs 115-125). The Court has found that, in relation to these three persons (among others), the United States has committed breaches of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention and Article 36, paragraphs 1 *(a)* and *(c)*, of that Convention; moreover,

in respect of those three persons alone, the United States has also committed breaches of Article 36, paragraph 2, of the said Convention. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 *et seq.* of the present Judgment.

*

* *

153. For these reasons,

THE COURT,

(1) By thirteen votes to two,

Rejects the objection by the United Mexican States to the admissibility of the objections presented by the United States of America to the jurisdiction of the Court and the admissibility of the Mexican claims;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka;

AGAINST: *Judge* Parra-Aranguren; *Judge* ad hoc Sepúlveda;

(2) Unanimously,

Rejects the four objections by the United States of America to the jurisdiction of the Court;

(3) Unanimously,

Rejects the five objections by the United States of America to the admissibility of the claims of the United Mexican States;

(4) By fourteen votes to one,

Finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(5) By fourteen votes to one,

Finds that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106 (2) above and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1 *(b)*;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(6) By fourteen votes to one,

Finds that, in relation to the 49 Mexican nationals referred to in paragraph 106 (3) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 *(a)* and *(c)*, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(7) By fourteen votes to one,

Finds that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 *(c)*, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(8) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Con-

vention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(10) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention; and *finds* that this commitment must be

regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of March, two thousand and four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

President SHI and Vice-President RANJEVA append declarations to the Judgment of the Court; Judges VERESHCHETIN, PARRA-ARANGUREN and TOMKA and Judge *ad hoc* SEPÚLVEDA append separate opinions to the Judgment of the Court.

(Initialled) J.Y.S.

(Initialled) Ph.C.

THE WHITE HOUSE
WASHINGTON

February 28, 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Compliance with the Decision of the International Court of Justice in *Avena*

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

(*signed*) GEORGE W. BUSH

Supreme Court, U.S.
FILED
MAR 22 2007
OFFICE OF THE CLERK

(5)

No. 06-984

In the Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States)*, 2004 I.C.J. 128 (Mar. 31), the International Court of Justice determined that, based on violations of the Vienna Convention, 51 named Mexican nationals, including Petitioner José Ernesto Medellín, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. Prior to the *Avena* decision, Medellín had submitted an application for habeas corpus relief in Texas state court, based in part upon a violation of the Vienna Convention. That claim was reviewed and rejected, *inter alia*, on the merits.

Subsequently, the President issued a "Memorandum for the Attorney General" ("Executive memorandum"), stating that he had determined that the United States would "discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

This case presents the following questions:

1. Does Medellín's petition for a writ of certiorari present an actual controversy within the Court's jurisdiction when Texas courts have already provided the review of his conviction and sentence prescribed by *Avena*?

2. Does the Executive memorandum constitute binding federal law abrogating Article 11.071, Section 5 of Texas's Code of Criminal Procedure governing the availability of a state writ of habeas corpus?

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BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because it fails to present an actual case or controversy within the Court's jurisdiction, and, in any event, the Texas Court of Criminal Appeals correctly concluded that the Executive memorandum cannot preempt Article 11.071, Section 5 of the Texas Code of Criminal Procedure.

Medellín urges the Court to grant review in order to resolve whether, under either the *Avena* decision itself or the Executive memorandum, Texas state courts must provide him the review and reconsideration of his case prescribed by *Avena*. But when his first application for state habeas relief was adjudicated, Texas courts provided the merits review of Medellín's conviction and sentence ultimately required by *Avena*. Given that the *Avena* decision has already been "given effect" in Medellín's case, the questions presented in his petition are moot.

And, even if the questions presented in his petition were not rendered moot by the review of his case already provided by Texas courts, the petition nonetheless would not warrant review. In *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669, 2683-85 (2006), the Court determined that decisions of the ICJ are not binding on American courts. Medellín's request that the Court revisit an issue decided last Term is without merit. Finally, the Court of Criminal Appeals correctly decided that the Executive memorandum cannot abrogate Texas's criminal procedure statute governing the availability of a state writ of habeas corpus. Medellín's contention otherwise finds no support in any provision of the Constitution, any federal statute, or the applicable jurisprudence of the Court. The petition should be denied.

STATEMENT

Medellín's Conviction for His Confessed Participation in the Gang Rape and Murder of Jennifer Ertman and Elizabeth Pena: On the evening of June 24, 1993, Medellín and fellow members of the "Black and Whites" gang in Houston, Texas, gathered together to initiate a new member, Raul Villareal. *Medellín* v. *State*, No. 71,997, slip op., at 2 (Tex. Crim. App. 1997); *Medellín I* Pet. App. 4a.[1] The initiation involved Villareal's fighting each member of the gang for a five to ten minute period, and culminated with his acceptance into the gang. *Id.*

Around 11:15 p.m., fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were walking home from visiting a girlfriend when they took a shortcut that led them near Medellín and his fellow gang members. *Id.* As they passed Medellín, he attempted to engage Elizabeth in conversation. *Id.* When she tried to run, Medellín grabbed her and threw her to the ground. *Id.* Elizabeth screamed for Jennifer to help her. *Id.* In response to her friend's cries, Jennifer ran back to help, but she was grabbed by two other gang members and also thrown to the ground. *Id.*

As Medellín later confessed, what ensued was the brutal gang rape and murder of both Jennifer and Elizabeth. *Id.*, at 5a. The gang members orally, vaginally, and anally raped both girls. *Id.* When they were done, they strangled both girls to death. *Id.*, at 5a-6a.

At approximately 4:00 a.m. on June 29, 1993, Medellín was arrested in connection with the gang rape and murder of

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1. Citations to materials in the Appendix to Medellín's prior petition for a writ of certiorari submitted in *Medellín* v. *Dretke*, 544 U.S. 660 (2005) (*Medellín I*), will be referenced herein as "*Medellín I* Pet. App.," followed by the page number(s).

Jennifer and Elizabeth. 30.TR.629-30.[2] Between 5:54 and 7:23 a.m. on that same day, after reading *Miranda* warnings aloud and signing a written waiver, Medellín gave a written confession of his participation in the crime. *See Medellín I* Joint Appendix at 14-18. At that time, Medellín, a Mexican national who had lived most of his life in the United States, was not notified by law enforcement authorities of the Vienna Convention provision permitting him to seek assistance from the Mexican consulate following his arrest.[3]

Medellín was convicted of murder during the course of a sexual assault — a capital offense. 33.TR.66-68. The jury recommended a death sentence, and the district court sentenced Medellín to death. *Medellín I* Pet. App. 3a. Medellín, who had the assistance of two court-appointed attorneys, did not assert any claim under the Vienna Convention at trial or sentencing.

Medellín's First State Habeas Application: The Texas Court of Criminal Appeals affirmed Medellín's conviction and sentence in an unpublished opinion. *See* Exhibit B to Medellín's Application for Writ of Habeas Corpus (hereafter

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2. "TR" refers to the reporter's record, preceded by the volume number and followed by the page numbers.

3. The Vienna Convention on Consular Relations is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving nation." *United States v. Alvarado-Torres*, 45 F.Supp.2d 986, 988 (S.D. Cal. 1999). Article 36(1)(b) of the Convention states that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" notified of his detention. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 101; *Medellín I* Pet. App. 137a-38a. Article 36(1)(a) provides that consular officers shall be free to communicate with nationals of the sending state, and Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. *Id.*

referenced as the "First Application"). Rather than petition this Court for certiorari, Medellín contacted the Mexican consulate, and the consular authorities began assisting him with a state habeas corpus application. Eleven months later, Medellín filed his First Application seeking habeas corpus relief.

In his First Application, Medellín asserted for the first time that the failure to notify him of his right to inform the Mexican consulate of his arrest for capital murder violated his rights under the United States Constitution. *See* First Application at 25.[4] The district court concluded that Medellín's Vienna Convention claim should fail, *inter alia*, because he failed to show that he was harmed by any Vienna Convention violation. Specifically, the trial court found that Medellín "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." *Medellín I* Pet. App. 56a. The Texas Court of Criminal Appeals found the trial court's conclusions to be supported by the record and affirmed. *Id.*, at 32a-33a.

Federal Habeas Proceedings in the District Court and the Fifth Circuit: After his First Application was rejected, Medellín filed a petition for a writ of habeas corpus in federal district court. *See Medellín* v. *Cockrell*, No. H-01-4078 (S.D. Tex. June 25, 2003); *Medellín I* Pet. App. 59a-118a. Medellín asserted that he should receive a new trial because he had not been advised of his right to consular notification under the Vienna Convention. *Id.*, at 79a.

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4. The only harm Medellín alleged in his First Application as arising from the failure to notify him of his rights under the Vienna Convention was that his confession should not have been considered by the jury because it was "obtained in violation of the Vienna Convention on Consular Relations." First Application at 31.

The federal district court rejected that claim, *id.*, at 79a-85a, holding that Medellín's failure to raise his Vienna Convention claim at trial as required by Texas's contemporaneous-objection rule constituted an adequate and independent state ground barring federal habeas review. *Id.*, at 79a-82a. Applying the Court's decision in *Breard* v. *Greene*, 523 U.S. 371, 375-76 (1998) (per curiam), the district court also rejected Medellín's argument that Vienna Convention claims are exempt from the procedural default doctrine. *Id.*, at 80a-81a.[5]

Finally, the federal district court, like the state courts, rejected Medellín's Vienna Convention claim on the merits. The court concluded that Medellín "failed to show prejudice for the Vienna Convention violation," *id.*, at 85a, and that the state court's determination that he failed to show "concrete, non-speculative harm" was not "'contrary to, or an unreasonable application of, federal law.'" *Id.*, at 84a (quoting 28 U.S.C. §2254(d)(1)). The district court denied both Medellín's claim for habeas relief and his application for a certificate of appealability. *Id.*, at 118a.

Medellín subsequently applied to the Fifth Circuit for a COA, which was denied. *See Medellín* v. *Dretke*, 371 F.3d 270, (CA5 2004); *Medellín I* Pet. App. 119a-135a. While Medellín's

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5. Medellín argued that the federal court should follow the post-*Breard* decision of the International Court of Justice in *Federal Republic of Germany* v. *United States*, 2001 I.C.J. 466 (June 27) (*LaGrand*). In *LaGrand*, the ICJ determined that the consular notification provisions in Article 36 of the Vienna Convention created individual rights, and that the application of procedural default to preclude the LaGrands from challenging their convictions violated Article 36(2) of the treaty by "preventing 'full effect [from being] given to the purposes for which the [consular notification] rights accorded under this article are intended.'" *Id.*, ¶91, at 497-98. Noting conflict between *LaGrand* and *Breard*, the district court declined to follow the *LaGrand* decision's holding that procedural default should not apply to Vienna Convention claims. *Medellín I* Pet. App. at 82a.

application for COA was still pending in the Fifth Circuit, the ICJ issued its decision in *Avena*; Appendix to the Petition ("Pet. App.") at 86a-186a.

The ICJ concluded that Article 36 had been violated in the case of Medellín and 50 other Mexican nationals. *Id.*, at ¶¶106, 153; Pet. App. 155a-57a, 182a-85a. The ICJ rejected Mexico's request for annulment of the convictions and sentences, and concluded that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of the sentences and convictions of Medellín and the other 50 Mexican nationals. *See id.*, at ¶¶14, 121-23, 153(9); Pet. App. 106a-07a, 165a-66a, 185a. The ICJ further concluded that the "review and reconsideration" must take place within the judicial system of the United States, and that the doctrine of procedural default could not bar such review. *See id.*, at ¶¶111-13, 120-22, 133-34, 138-41; Pet. App. 159a-61a, 164a-65a, 170a-71a, 173a-74a.

Although the Fifth Circuit acknowledged the ICJ's decisions in *Avena* and *LaGrand*, it held that it was bound by this Court's decision in *Breard* that Vienna Convention claims are subject to procedural default, and that Medellín had therefore defaulted any claim he might have under the Convention. *See Medellín I* Pet. App. 132a. The court also held that Medellín could not prevail because a prior Fifth Circuit panel had held that Article 36 of the Vienna Convention does not create an individually enforceable right, and the court was required to follow its own precedent. *Id.*, at 133a.

***Medellín I*: Proceedings Before This Court on Medellín's First Petition for a Writ of Certiorari:** The Court subsequently granted certiorari in Medellín's case to resolve two questions: (1) whether a federal court was bound by the ICJ's *Avena* decision that United States' courts must reconsider Medellín's Vienna Convention claim without regard to procedural default doctrines; and (2) whether a federal court

must give effect to the ICJ's *Avena* decision as a matter of judicial comity and uniform treaty interpretation. *Medellín* v. *Dretke*, 544 U.S. 660, 661 (2005) (per curiam) (*Medellín I*).

While the case was pending before the Court, the President issued a document styled as a "Memorandum for the Attorney General." Pet. App. 187a. The operative language of the memorandum reads as follows:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." *Id.*

The memorandum was subsequently circulated by the U.S. Attorney General to the Attorney General of Texas. Pet. App. 76a. After the Executive memorandum issued, Medellín filed a subsequent state application for a writ of habeas corpus. The subsequent application relied on the memorandum and the *Avena* decision as bases for relief that were not available when he filed his first application for state habeas relief. *Medellín*, 544 U.S., at 663-64. Based in part on both the Executive memorandum and the filing of Medellín's subsequent state habeas application, the Court dismissed the writ as improvidently granted. *Id.*, at 666-67.

Proceedings in the Texas Court of Criminal Appeals on Medellín's Subsequent Application for State Habeas Relief: Under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure, Texas courts may not consider the merits of any claims raised on a subsequent application for a writ of

habeas corpus, or grant relief on such claims, unless the applicant provides sufficient specific facts demonstrating that:

> "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." TEX. CODE CRIM. PROC. art. 11.071, §5(a)(1).

Texas courts have no jurisdiction to review a subsequent habeas application that fails to meet the requirements of Article 11.071.

In support of his subsequent habeas application, Medellín argued that the *Avena* decision and the Executive memorandum constituted binding federal law that preempt Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure. *See* Br. of Applicant at 26-27. In the alternative, Medellín argued that he met the requirements of Section 5(a)(1) because the *Avena* decision and the Executive memorandum constitute factual and legal bases that were unavailable when he filed his first application for state habeas relief. *Id.*, at 52-53.

The Texas Court of Criminal Appeals disagreed. The court first rejected Medellín's claim that *Avena* preempts Section 5, concluding that in *Sanchez-Llamas*, this Court considered and rejected the argument that ICJ decisions are binding federal law. Pet. App. 21a-24a. The court next addressed Medellín's argument that the Executive memorandum preempts Section 5, and accordingly requires Texas courts to review and reconsider Medellín's conviction and sentence as prescribed by *Avena*. Although all the members of the Court of Criminal Appeals agreed that the Executive memorandum did not preempt Section 5, the court did not generate a majority

opinion on this issue. *See* Pet. App. 1a, 24a-55a, 64a-71a, 74a-79a.

Judge Keasler's plurality opinion,[6] Pet. App. 24a-55a, assumed — without deciding — that the memorandum constituted an executive order requiring Texas's compliance. Pet. App. 24a-25a. The plurality observed that, although the President's power, when acting in external affairs, is "'plenary and exclusive . . . as the sole organ of the federal government in the field of international relations,'" Pet. App. 26a (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)), nonetheless "[e]xecutive orders issued by the President must be authorized by an act of Congress or by the Constitution." Pet. App. 27a (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952)). Treating the Executive memorandum as an order intended to bind Texas courts, the plurality considered the memorandum to be an "unprecedented" exercise of executive power, Pet. App. 29a, and held that he had exceeded his constitutional authority "by intruding into the independent power of the judiciary." Pet. App. 30a.

The plurality concluded that the Executive memorandum — like the *Avena* decision itself — improperly attempts to invest the ICJ with the power to determine the meaning and effect of a treaty as a matter of United States domestic law. *See id.*

Presiding Judge Keller filed a concurring opinion opining that the President does not have the power to order a state court to ignore rules of procedural default and statutes governing successive habeas corpus petitions in order to reevaluate whether Medellín was prejudiced by a failure to comply with the Vienna Convention. Pet. App. 64a-65a. She observed that the Court has typically declined to construe executive agreements or treaties as preempting state laws

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6. This opinion was joined by Judges Meyers, Price, and Hervey. Pet. App. 1a.

involving "traditional area[s] of state competence and applied equally to citizens and non-citizens," Pet. App. 67a, most recently in the *Sanchez-Llamas* decision recognizing that the Vienna Convention does not preempt state rules of procedural default, *id.* (citing *Sanchez-Llamas*, 126 S.Ct., at 2682-88). She concluded that, to the extent the President is purporting to preempt state criminal procedure statutes through his memorandum, he is not acting pursuant to any authorization conferred by the Vienna Convention or the Optional Protocol. *See id.*

Based on this analysis, Presiding Judge Keller concluded that the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution." Pet. App. 71a.

Judges Hervey and Cochran also filed opinions concurring in the court's decision that the Executive memorandum does not preempt Section 5 of Article 11.071. Pet. App. 74a-79a. Judge Hervey, referencing the alternative merits holding in Medellín's First Application that he failed to establish that he suffered any prejudice from the Vienna Convention violation, concluded that the "review and reconsideration" required by *Avena* and or the Executive memorandum has already occurred, and the case therefore presents no actual controversy. Pet. App. 74a.

Judge Cochran agreed that the Executive memorandum did not preempt Section 5 of Article 11.071 because she did not consider the memorandum to "constitute[] the enactment of federal law that is binding on state courts." Pet. App. 76a.[7] She observed that executive orders, "except those which do not have general applicability and legal effect or are effective only

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7. Judges Johnson and Holcomb joined Judge Cochran's concurring opinion. Pet. App. 76a.

against federal agencies, are drafted, reviewed, and promulgated in a specific manner and then published in the Federal Register." Pet. App. 77a. Under the circumstances, and given that the memorandum is not published in the Federal Register and could be found only on the White House Press Release website, Judge Cochran could not "accept the proposition that binding federal law . . . can be accomplished through a Presidential press release of a private memorandum directed to the Attorney General." Pet. App. 78a-79a.

Finally, the Court of Criminal Appeals held that — as a matter of state law — neither the *Avena* decision nor the Executive memorandum constituted a previously unavailable "factual basis" or "legal basis" for Medellín's habeas claims, and therefore his subsequent application did not meet the requirements of Article 11.071, Section 5(a)(1) so as to permit the court to provide further review and reconsideration of his Vienna Convention claim. *See* Pet. App. 56a-64a.[8]

REASONS TO DENY THE PETITION

Medellín's petition contends that the Texas Court of Criminal Appeals erred in determining that neither the *Avena* decision nor the Executive memorandum constitute binding federal law that preempts Article 11.071 of the Texas Code of Criminal Procedure. *See* Pet., at 23, 26. Neither of these contentions warrants certiorari review.

I. THE QUESTIONS PRESENTED IN THE PETITION ARE MOOT.

Medellín asserts that two questions are presented for the Court's review in this case: (1) whether state courts are bound by the Constitution to enforce the ICJ's *Avena* decision; and (2) whether the President acted within his foreign affairs authority when he issued a memorandum stating that the United States

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8. Medellín's Petition for Writ of Certiorari does not ask the Court to review this state-law determination of the Court of Criminal Appeals.

would meet its international obligations under *Avena* by having state courts give effect to the decision. *See* Pet., at i.

Both of Medellín's contentions are premised on the supposition that the ICJ's *Avena* decision has not been "given effect" as to Medellín, meaning that he has never received a review and adjudication as to whether the Vienna Convention violation in his case caused him actual prejudice. But Medellín received the actual prejudice review of his conviction and sentence, ultimately prescribed by the ICJ in *Avena*, when his first application for state habeas corpus relief was adjudicated. For that reason, Texas has already "given effect" to *Avena* in Medellín's case, and the questions of executive power and the enforceability of ICJ decisions in domestic courts set forth in Medellín's petition are moot.

A. *Avena* Required Domestic Courts to Review Whether Vienna Convention Violations Caused "Actual Prejudice" to Foreign Nationals.

In *Avena*, the ICJ prescribed a specific remedy for the Article 36 violations it concluded had occurred in the case of Medellín and 50 other Mexican nationals. Rejecting Mexico's request for annulment of their convictions and sentences, the ICJ stated that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of the sentences and convictions of Medellín and the other Mexican nationals. *See Avena*, at ¶¶14, 121-23, 153(9); Pet. App. 106a-07a, 165a-66a, 185a.

This "review and reconsideration," required a review "with a view to ascertaining whether in each case . . . the violation . . . *caused actual prejudice to the defendant* in the process of the administration of justice." *Id.*, ¶121; Pet. App. 165a (emphasis added). The ICJ viewed this review as addressing the question "whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties . . ." *Id.*, at

¶122; Pet. App. 165a. Thus, *Avena* prescribed a merits inquiry by a domestic court in each case to determine whether the Vienna Convention violation actually prejudiced the convicted Mexican national — that is, whether the violation ultimately caused their conviction and sentence.

B. The Resolution of Medellín's First Application for State Habeas Corpus Relief Satisfied *Avena*.

In its findings of fact and conclusions of law concerning Medellín's First Application, the state trial court rejected his Vienna Convention claim on several alternative grounds. *See Medellín I* Pet. App. 55a-57a. One of those alternative holdings, consistent with the ICJ's subsequent decision in *Avena*, addressed the merits of Medellín's claim, particularly whether he had established that the violation actually caused his conviction or punishment:

> "The applicant fails to show that his rights, pursuant to U.S. CONST.amends. V, VI, and XIV, were violated and *fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Medellín I* Pet. App. 57a (emphasis added).

The trial court also concluded that Medellín "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellín] was provided with effective legal representation upon [his] request; and [his] constitutional rights were safeguarded." *Id.*, at 56a. The Texas Court of Criminal Appeals found these conclusions to be supported by the record and affirmed. *Id.*, at 32a-33a.

These alternative merits holdings establish that Texas courts have already provided the review prescribed by *Avena* in resolving his First Application for state habeas relief. Indeed, the *Barber* standard applied by the Texas court, requiring that the complained-of error must have "contributed" to the applicant's conviction or punishment to merit relief, is even more stringent than the ICJ's formulation that the courts should review whether the Article 36 violation "ultimately led to convictions and severe penalties." *Avena*, at ¶122; Pet. App. 165a.

Because Texas already provided the review *Avena* prescribed when it resolved Medellín's First Application, the questions whether the *Avena* decision or the Executive memorandum preempt Texas law are moot. This Court, like all federal courts, lacks jurisdiction to decide moot cases because its constitutional authority extends only to actual cases or controversies. *See Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam). Medellín's petition should therefore be denied.

II. The Court Has Already Determined That ICJ Decisions Are Not Binding on Domestic Courts.

Even if Medellín's petition otherwise presented an actual controversy within the Court's jurisdiction, he erroneously suggests that the case warrants review to decide the question whether the ICJ's *Avena* decision is binding on American courts. Pet., at i, 15-16. The Court, however, squarely decided this question last Term in *Sanchez-Llamas*. This case does not warrant review in order for the Court to revisit that issue.

In *Sanchez-Llamas*, the Court considered and rejected the argument that the ICJ's decisions are controlling on American courts. *See Sanchez-Llamas*, 126 S.Ct., at 2683-85. The Court first addressed the arguments that the decisions in *LaGrand* and *Avena* required the Court to revisit its holding in *Breard* regarding the applicability of doctrines of procedural default to

Vienna Convention claims, and that the United States was obligated to comply with the ICJ's interpretation of the Convention. *Id.*, at 2683. The Court expressly rejected these arguments, concluding that, although the ICJ's interpretation of the Vienna Convention merited "'respectful consideration,'" the *LaGrand* and *Avena* decisions did not "compel us to reconsider our understanding of the Convention in *Breard*." *Id.* (quoting *Breard*, 523 U.S., at 375).

Significantly, the Court made clear that its conclusions were not limited to the *Avena* and *LaGrand* decisions, or to the particular facts and circumstances presented in *Sanchez-Llamas*. Rather, the Court's language was comprehensive: "Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." *Id.*, at 2684. Noting that the ICJ's "principal purpose is to arbitrate particular disputes between national governments," and that its decisions "are not binding precedent *even as to the ICJ itself*," the Court found "little reason to think that such interpretations were intended to be controlling on our courts." *Id.* Based on its conclusion that ICJ decisions are not binding on U.S. courts, the Court confirmed that the decisions in *LaGrand* and *Avena* are "entitled only to the respectful consideration due an interpretation of an international agreement by an international court." *Id.*, at 2685 (internal quotation omitted).

Medellín now invites the Court to revisit the issue it considered and decided in *Sanchez-Llamas* whether an ICJ decision is binding on domestic courts. *See* Pet., at i, 15-16. Medellín reasons that his case is not encompassed by *Sanchez-Llamas* because, unlike the petitioners in that case, he was one of the Mexican nationals specifically named in the *Avena* decision. Pet., at 15-16.

But this distinction is irrelevant. The Court's determination in *Sanchez-Llamas* that ICJ decisions are not

binding on domestic courts was not qualified by the fact that the defendants in that case were not named in *Avena* or *LaGrand*. *See id.*, at 2683-85. Indeed, the Court made clear that ICJ decisions have "'*no binding force* except between the parties and in respect of that particular case," and that "'[o]nly states [*i.e.* countries] may be parties in cases before the [ICJ].'" *Id.*, at 2684 (quoting STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, arts. 34, 59, 59 Stat. 1055 (1945)). Neither Medellín nor the State of Texas were parties to the *Avena* decision and, as the Court explained in *Sanchez-Llamas*, although the United States "has agreed to comply with ICJ decisions in any case to which it is a party, the [U.N.] Charter's procedures for noncompliance-referral to the Security Council by the aggrieved state-contemplates quintessentially *international* remedies." *Id.*, at 2684-85 (internal quotation omitted).

Thus, *Sanchez-Llamas* recognizes that non-parties to ICJ decisions have no standing to enforce such decisions in any domestic forum. Finally, there is no indication in *Sanchez-Llamas* that the Court's unqualified conclusion that the ICJ's decisions do not bind American courts is somehow limited in cases brought by individuals referenced in a particular ICJ decision. *See id.*, at 2683-85. The Court should decline Medellín's invitation to reconsider an issue squarely addressed just one year ago in *Sanchez-Llamas*.

III. THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY CONCLUDED THAT THE EXECUTIVE MEMORANDUM CANNOT PREEMPT TEXAS CRIMINAL LAW.

Because the Court of Criminal Appeals correctly concluded that, under the Constitution, the Executive memorandum cannot preempt Article 11.071 of the Texas Code of Criminal Procedure, this case does not warrant review.

A. The Executive Memorandum Exceeds the President's Authority Under the Constitution.

The Court has consistently recognized that the President's Article II powers are limited to executing, not creating, the law. The Court explained this principle in *Youngstown*: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be the lawmaker . . . And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown*, 343 U.S., at 587-88. The Court reaffirmed this principle just last Term in *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006), in its rejection of unilateral executive authority to create special military tribunals beyond the scope of congressional authorization, *id.*, at 2773 (""The power to make the necessary laws is in the Congress; the power to execute in the President."") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866)).

Medellín's contentions rely upon just such a hypothetically limitless executive power to create law based on unilateral decisions concerning the foreign affairs interests of the United States. But no enumerated power in Article II allows the President to order a State to disregard its own habeas corpus statute and review a claim based on the decision of a foreign tribunal that this Court has determined has no binding effect on domestic courts.

1. The text of Article II does not confer power on the President to create domestic law incident to his treaty-making or foreign affairs powers.

Medellín argues that the Executive memorandum constitutes binding federal law preempting Texas procedural rules based upon the President's powers set forth in Article II, §§1-3. But no constitutional provision supports his authority to issue such an order. Neither the text of the Vesting Clause nor the President's foreign affairs powers gives him the

authority to create domestic law incident to treaty-making. That power is allocated by the Constitution to Congress. *See* U.S. CONST. art. II, §2(2).

Although the President has a general power to "make" treaties, Article II, Section 2 qualifies that power by requiring the consent of two-thirds of the Senate before a treaty becomes the "supreme Law of the Land." *See id.* And it is well-established that the President is bound by the reservations and conditions imposed by the Senate in granting its consent, including what effect a treaty will have in domestic law.[9] Indeed, as the United States argued in its *amicus* brief filed in *Medellín I*, the Senate ratified the Vienna Convention — the treaty underlying the *Avena* decision — with the express understanding that the Convention does not "change or affect present U.S. laws or practice." U.S. *Medellín I* Amicus Br., at 21-22 (stating that "[t]he Senate Foreign relations Committee . . . cited as a factor in its endorsement of the treaty that '[t]he Convention does not change or affect present U.S. laws or practice.'") (quoting S. Exec. Rep. No. 91-9, at 2 (1969)).

Because there has been no action by Congress rendering the *Avena* judgment self-executing federal law, the decisions of the ICJ, necessarily including *Avena*, do not of themselves constitute federal law binding on American courts. *See Sanchez-Llamas*, 126 S.Ct., at 2683-85. There is thus no basis in Article II, Sections 1 or 2, supporting a unilateral Executive power to declare that the judgment of a foreign tribunal must be "given effect" as binding federal law displacing a state habeas corpus statute.

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9. For example, the Senate routinely declares that human rights treaties are not self-executing. *See* Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, at 9, 19, 23 (1994); Comm. on Foreign Relations, Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 30-31 (1992).

For similar reasons, the President lacks authority under Article II, Section 3's "Take Care" Clause to impose the memorandum on the States. Where, as here, there is no treaty or international law obligation that has created of its own force a directly cognizable federal law, *see Sanchez-Llamas*, 126 S.Ct., at 2683-85, there is nothing for the President to "faithfully execute."

2. The treaties and statutes on which Medellín relies do not vest the President with power to transform a non-binding ICJ decision into binding federal law.

The United States has explicitly acknowledged that neither the Vienna Convention nor its Optional Protocol on ICJ jurisdiction create rights that are directly enforceable in domestic courts. *See* U.S. *Medellín I* Br., at 20-21, 33-34. Nonetheless, both the United States and Medellín have argued that the obligation in Article 94 of the U.N. Charter to comply with ICJ decisions implicitly grants to the President the power to render such decisions binding on domestic courts. *See* U.S. *Medellín I* Br., at 38-39, 42-43; Pet., at 20-21.

But this view of the President's foreign affairs powers ignores the significant distinction between international obligation and domestic lawmaking. Under our constitutional system not every treaty creates domestic law rights, obligations, or powers. This is the essence of a "non-self-executing treaty." And it has long been clear that the responsibility for transforming an international law obligation into a domestic rule of law falls to Congress, not the President.[10] Indeed, the Constitution expressly grants to

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10. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 319 (1829) (Where a treaty merely represents a promise of the United States under international law, "the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to

Congress the authority to do so in the Necessary and Proper Clause of Article I. U.S. CONST. art. I, §8, cl.18; *see also Missouri* v. *Holland*, 252 U.S. 416, 431-32 (1920).

Further, if the Executive's power were truly so broad under Article 94, it would reflect the President's possession of substantial and previously unrecognized lawmaking power. Article 94 is only one of a variety of Charter obligations accepted by member States to comply with the decisions of U.N. institutions.[11] Perhaps the most significant of these is the commitment to carry out decisions of the Security Council. If Medellín and the United States are correct, then any formal agreement among members of the Security Council would by itself provide authority for the President to create binding domestic law on his own initiative — preemptive upon the States — without the involvement or authorization of Congress.

Nor do the federal statutes on which Medellín relies support the President's authority to issue a "memorandum" with preemptive force. Medellín cites to statutes generally authorizing or obligating the President to obtain the release of United States citizens detained abroad,[12] to protect foreign individuals in the United States as authorized by law,[13] and to oversee the relations of the United States with organs of the

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disregard the existing laws on the subject."); *see also Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . ").

11. *See* U.N. CHARTER art. 25 (obligating member States "to accept and carry out the decisions of the Security Council in accordance with the present Charter"); *id.*, art. 49 (obligating member States to "join in affording mutual assistance in carrying out measures decided upon by the Security Council" with regard to responses to breaches of the peace and acts of aggression).

12. 22 U.S.C. §1732.

13. 22 U.S.C. §4802(a)(1)(D).

United Nations.[14] Although these statutes assign an important role to the Executive Branch in protecting citizens traveling in foreign countries, and in generally coordinating the interactions of the United States with the United Nations, they do not provide any authorization for the President to mandate the state judiciary to implement *Avena*.

3. The President' s power in this instance is at its "lowest ebb" under *Youngstown*, and cannot survive scrutiny.

The validity of a President's exercise of his foreign affairs power has traditionally been evaluated not only under the text of the Constitution, but also based upon whether his actions are undertaken with the authorization of Congress or contrary to its will. *See Youngstown*, 343 U.S., at 635 (Jackson, J., concurring). As described by Justice Jackson in his *Youngstown* concurrence, the exercise of presidential power falls into three categories:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.
>
> 2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.
>
> 3. When the President takes measures incompatible with the expressed or implied

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14. 22 U.S.C. §287(a), 287a.

> will of Congress, his power is at its lowest ebb . . . Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.*, at 635, 637-38.

Judge Keasler's plurality opinion correctly concludes that the President's action in issuing the memorandum falls into *Youngstown*'s third category. Pet. App. 44a-45a. Indeed, the President's action is incompatible with the will of Congress for at least three reasons. First, the President's effort to enforce compliance with ICJ decisions through judicial means contravenes the Senate's express intention, when it ratified the U.N. Charter and the Optional Protocol, that ICJ decisions would be enforced only through diplomatic or political means. Second, central to the *Avena* decision is the proposition that the Vienna Convention confers individual rights enforceable in American courts. Because the Executive memorandum purports to compel compliance with that decision in state courts, it contravenes the intent of the Senate when it ratified the Vienna Convention. Finally, as noted by Judge Keasler, the President's action here does not arise from an executive agreement, much less an agreement acquiesced to by Congress, but rather reflects a unilateral executive policy decision.

The ratification histories of both the U.N. Charter and the Optional Protocol do not show any acquiescence by the Senate to the notion that ICJ decisions would be enforceable in domestic courts and certainly not by unilateral Executive memorandum. Rather, the ratification history of each treaty indicates that ICJ decisions were not intended to be judicially enforceable, but were to be enforced through diplomatic or political means. With respect to Article 94 of the U.N. Charter, which states that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party," the understanding at the time of ratification was that ICJ decisions

would be enforced exclusively through the Security Council pursuant to Article 94(2), which provides in turn that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council."[15]

Likewise, the ratification history of the Optional Protocol, which confers jurisdiction on the ICJ to adjudicate disputes arising over the interpretation and application of the Vienna Convention, shows that the intent on ratification was that ICJ decisions were meant to have only diplomatic or political force as opposed to judicial force in our domestic courts.[16] Given that the Senate did not intend decisions of the ICJ to be enforceable in American courts generally, the President's unilateral mandate that such a decision nonetheless should be enforced in state courts cannot be squared with the will of Congress.

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15. *See, e.g., A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (parties have a "moral obligation" to comply with ICJ decisions, and Article 94(2) constitutes the exclusive means of enforcing such decisions). 92 Cong. Rec. 10,694 (1946) (statement of Senator Pepper) ("The power of effective enforcement lies only in the Security Council; and in the Security Council an effective decision cannot be made to take action against a nation unless there is a unanimity of the Big Five.").

16. As a representative of the State Department explained in testimony before the Senate, "[i]f problems should arise regarding the interpretation or application of the [Vienna Convention], such problems would probably be resolved through *diplomatic* channels." Vienna Convention on Consular relations, S. Exec. Rep. No. 91-9, at 19 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (emphasis added). Mr. Lyerly further observed that "parties to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id.* And the State Department made clear that nothing related to the Convention was intended in any way to change U.S. laws or practice. *See* S. Exec. Doc. E, 91-1 (1969).

The Executive memorandum also conflicts with the will of Congress concerning the effect in domestic law of the Vienna Convention itself. By requiring that state courts implement *Avena*, the Executive memorandum necessarily attempts to impose the ICJ's interpretation of the Convention's enforceability in our domestic judicial system. But that was not the intended effect of the Convention.[17] Accordingly, the Executive's attempt to impose the *Avena* decision on Texas state courts, and abrogate a Texas statute in order to enforce the ICJ's mandate that Medellín has an individual right to further judicial review of his conviction and sentence, works directly against the will of Congress in ratifying the Convention.

Finally, to the extent the Court has previously recognized the President's independent authority in the field of foreign affairs, such recognition has been tied to congressional authorization or acquiescence in specific types of executive agreements. Because the memorandum is not based upon any executive agreement with Mexico concerning the remedy for the Vienna Convention violations addressed in *Avena*, but rather upon a policy decision made solely by the President and contrary to the will of Congress, it cannot be supported under even the broadest view of his foreign affairs power.[18]

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17. For example, a State Department legal adviser submitted written testimony on the Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that "[t]he Vienna . . . Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." *Id.* The Department's testimony also emphasized the Vienna Conventions preamble, cited above, which states explicitly that the treaty's purpose is "not to benefit individuals." Appendix, S. Exec. Doc. E (1969).

18. In addition, as Judge Keasler concluded, the memorandum also improperly intrudes into the independent power of the judiciary by attempting to "dictate to the judiciary what law to apply or how to interpret the applicable law." Pet. App. 30a.

The Court has recognized a limited set of circumstances in which the President may wield independent authority in the field of international relations. Medellín relies upon the four arguably most notable foreign affairs power cases in support of his assertion that the President has constitutional authority to issue and enforce the memorandum: *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); and *American Insurance Association* v. *Garamendi*, 539 U.S. 396 (2003). A careful review of these cases, however, demonstrates that the President's action here does not comport with the standards set forth by the Court delineating wherein the Executive possesses inherent power to act in foreign affairs without congressional authorization.

In *Belmont*, the Court gave effect to an executive agreement with the Soviet Union that assigned all Soviet assets in the United States to the federal government for the purpose of settling outstanding claims between the Soviet government and American citizens. *Belmont*, 301 U.S., at 330. Because the agreement was made with the specific purpose of facilitating the recognition and establishment of diplomatic relations with the Soviet Union — a function deemed to fall entirely within the competence of the President — the Court concluded that the President had the authority to act as the sole organ of the national government, and therefore the assignment arising from the executive agreement did not require Senate advice and consent. *Id.* Similarly in *Pink*, the Court enforced the same agreement considered in *Belmont* against the State of New York on grounds that the "[p]ower to remove such obstacles to full recognition as [the] settlement of claims of our nationals . . . certainly is a modest implied power" of the President. *Pink*, 315 U.S., at 229. Thus, both *Belmont* and *Pink* predicated the President's authority to act without Senate

advice and consent on the President' implied power to recognize foreign countries, a premise for presidential authority that is not present in this case.

In *Dames & Moore*, the Court enforced an executive order suspending the claims of American nationals against Iran and subjecting them to binding arbitration in an Iran-United States Claims Tribunal pursuant to a hostage release agreement with Iran. *Dames & Moore*, 453 U.S., at 686. The Court based its decision on the ground that claim settlement by executive agreement was a longstanding practice to which Congress had acquiesced. *Id.*, at 678-80. Indeed, the Court stressed that, "[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.*, at 681.

As explained above, there is no history of congressional acquiescence, express or implied, authorizing the issuance of the Executive memorandum. Indeed, the very notion of historic congressional acquiescence to a particular type of independent executive foreign affairs action presupposes that there is "precedent" for the act.[19] In this case, however, the United States itself has candidly characterized the Executive memorandum as an "unprecedented" executive action,[20] and with good reason. There is simply no history at all of

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19. For example, in *Dames & Moore* the Court noted that " . . .the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate." *Id.*, at 681.

20. *See* Amicus Curiae Brief of the United States submitted in *Sanchez-Llamas*, at 29-30 ([T]he President has taken *unprecedented* action . . . to ensure compliance with the ICJ's judgment in *Avena* by determining that the convictions and sentence of the 51 Mexican nationals covered by that judgment receive review and reconsideration.") (emphasis added).

congressional acquiescence to an executive memorandum issued to the States, unsupported by any executive agreement, that purports to abrogate state criminal procedure statutes and force state courts to implement the judgment of a foreign tribunal.

In *Garamendi*, the Court held that a California statute requiring California insurers that sold insurance policies in Europe during the Holocaust to disclose certain information pertaining to those policies was preempted by the President's direct exercise of foreign affairs authority. *Garamendi*, 539 U.S., at 401. The preemption was specifically based on the President's effort to negotiate a settlement of Holocaust-era claims with Germany through the German Foundation Agreement. *Id.* In *Garamendi*, as in *Dames & Moore*, the Court affirmed the President's actions by citing the "particularly longstanding practice" of making executive agreements to settle the claims of American nationals against foreign governments. *Id.*, at 414-15. Of course, there is no such agreement in this case.

Thus, the notion that the President possesses a general power to use any means necessary, including mandating the enforcement of ICJ decisions in state courts, to resolve disputes with foreign governments without congressional authorization or an executive agreement is not consistent with any of the holdings of the executive-power decisions relied upon by Medellín. Rather, these cases serve to highlight the unprecedented nature of the Executive memorandum and the fact that here, unlike in those cases, Medellín's petition asks the Court to uphold presidential action contrary to the will of

Congress and therefore at the "lowest ebb" of his *Youngstown* authority. The Court should not do so.[21]

B. A Mandatory Construction of the Executive Memorandum Also Improperly Attempts to Vest the President With Authority to Alter the States' Systems for the Administration of Criminal Justice.

As the Court has consistently recognized, the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). The Court has also emphasized in the strongest terms the importance of this foundational principle of federalism: "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States* v. *Morrison*, 529 U.S. 598, 618 (2000).

And, to the limited extent the Federal Government has power over state criminal proceedings, that authority is derived from powers vested specifically in Congress, not the President: the power to enforce federal constitutional rights, U.S. CONST. amend. XIV, §5, to regulate the jurisdiction of the federal

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21. Indeed, given the lack of constitutional support for the notion that the Executive memorandum could operate as binding federal law abrogating Texas's criminal statute, it is most plausibly read as a request that States implement *Avena* to the extent permissible under state law — rather than as an executive order. The memorandum's language also supports construing it as such a request. It describes the States "giv[ing] effect" to the *Avena* decision "in accordance with general principles of comity." Pet. App. 187a. As the Court has long recognized, comity is a discretionary doctrine because "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). By invoking comity as the basis under which the States might give effect to *Avena*, it is unlikely that the President was *ordering*, as opposed to encouraging, them to perform any particular act.

courts, *id.*, art. III, §1, and to regulate the federal writ of habeas corpus specifically under the Suspension Clause, *id.*, art. I, §9; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861). The President has no such general powers.

Critically, the Texas statute at issue — Article 11.071 of the Texas Code of Criminal Procedure — is not a law targeted in any way at foreigners or foreign nations. It is Texas's criminal procedure statute governing the jurisdiction of Texas courts to consider the merits of subsequent applications for state habeas relief filed in a death penalty case. *See* TEX. CODE CRIM. PROC. art. 11.071.[22] It is hard to conceive of a law less appropriate to be abrogated by presidential fiat. Article 11.071 is: (1) a state statute governing the administration of Texas's criminal justice system; (2) it is applied neutrally without targeting in any way foreign affairs issues, and (3) it concerns the circumstances under which state habeas relief may be granted.

The Court has recognized that States have a general right to set out the parameters of the jurisdiction of their own courts. In *Howlett* v. *Rose*, the Court noted that "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [the Court] must act with utmost caution before deciding that it is obligated to entertain the claim." 496 U.S. 356, 372 (1990). The Court further explained that "[t]he general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' The States thus have great latitude to establish the structure and jurisdiction of their own courts." *Id.* (internal citations omitted).

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22. *See Ex parte Graves*, 70 S.W.3d 103, 115 (Tex. Crim. App. 2002) ("[I]n [*Ex parte*] *Davis*, this Court recognized that the Legislature, by enacting article 11.071, section 5, intended to limit this Court's jurisdiction over subsequent habeas petitions in death penalty cases.") (citation omitted).

And this must especially be true when the State is not required to provide *any* access to the courts. Such is the case with habeas corpus. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) ("States have no obligation to provide [postconviction] relief."). Yet the Executive memorandum, understood and enforced as a binding executive order, would forcibly alter the statutory jurisdiction of Texas courts as well as the parameters of state habeas corpus relief in Texas.

When considered in light of the traditional balance of federal-state sovereignty under the Constitution, according preemptive effect to a unilateral two-paragraph Executive memorandum — especially where the Executive explicitly agrees that the no international agreement requires any judicially-cognizable response — would be utterly without precedent. To allow executive fiat to abrogate state criminal statutes and to bind state habeas courts, merely in the name of international "comity," would potentially open the door to the wholesale preemption of state statutes across a wide range of subjects. Medellín's argument for just such an expansion of executive power runs contrary to the text of the Constitution and to this Court's prior decisions and so does not warrant this Court's review.[23]

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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23. A mandatory construction of the Executive memorandum would also violate the anticommandeering doctrine. The anticommandeering doctrine prohibits Congress from conscripting state legislatures or executive officers as its agents. *See New York v. United States*, 505 U.S. 144, 175-78 (1992); *Printz v. United States*, 521 U.S. 898, 925-26 (1997). Similarly, the Executive may not, consistent with the anticommandeering doctrine, force state courts to implement a federal remedy unauthorized by Congress and outside their jurisdiction under state law.

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March 2007

No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Texas's Brief in Opposition ignores the fundamental reason to grant the writ: as the President of the United States has acknowledged, the United States has an obligation to comply with the *Avena* judgment, and he has acted to secure compliance. The Texas Court of Criminal Appeals, without contesting the United States' obligation, has challenged the President's authority to act. Hence, there can be no doubt that, if left unreviewed, the Texas court's decision will place the United States in breach of treaty obligations entered into on behalf of the nation as a whole and directly frustrate the President's decision to meet those obligations. No clearer case for review by this Court could be presented.

While Texas attempts to defend the merits of the result below (and does so largely on grounds that are at odds with what the Texas court actually decided), it fails to offer a single reason for its assertion that the case "does not warrant review." Br. Opp. 16. The state's arguments that it somehow accidentally complied with the *Avena* judgment in Mr. Medellín's case before the judgment was even issued, or that *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), should be extended to the circumstances of this case, or that the President exceeded his lawful authority, are irrelevant to whether this Court should grant certiorari. As the United States has explained in its *amicus* brief, the decision below has

> set a course that, if not reversed, will place the United States in breach of its international law obligation to comply with the *Avena* decision, leave unresolved the dispute between Mexico and the United States over the treatment of petitioner, and frustrate the President's judgment that foreign pol-

> icy interests are best served by giving effect to that decision.

U.S. Br. 9; *see also* Mex. Br. at 14. Nothing that Texas says detracts from that point in any way.

A state court should not have the final word on whether the United States as a nation abides by its treaty obligations. All the participants in this case—the United States, Mexico, Mr. Medellín, and Texas—recognize that the United States has a binding obligation, under treaties ratified by the President with the advice and consent of the Senate, to abide by the *Avena* judgment. Pet. 25-26. All, with the apparent exception of Texas, take the view that the United States should abide by this obligation. And no one disputes that the Texas court's decision stands in the way of the President's efforts to comply with that obligation. It is the unique role of this Court, as the final authority on questions of federal law, to protect the federal government's constitutional power to enter into enforceable treaties and to conduct the foreign relations of the United States without interference from the courts of the several states.

I. This Case Is Not Moot.

In its brief in opposition, Texas takes the remarkable position that the issues presented by this case are moot, because the Texas trial court's adjudication of Mr. Medellín's first state post-conviction application in 2001, some three years before the issuance of *Avena*, supposedly gave effect to the *Avena* judgment. Br. Opp. 13-14. Even if this theory could somehow be correct, it ignores the reason that this Court's review is needed in this case: the Texas court held that he could not be given review and reconsideration in the Texas courts, even though the court understood that the failure to provide

that review and reconsideration would constitute a breach of the United States' international treaty obligations with which the President had determined the United States would comply.

The decision by the Texas Court of Criminal Appeals in no way suggests that Mr. Medellín has already received the review and reconsideration required by *Avena*, nor does it make any pretense of complying with *Avena*. Rather, the Texas court expressly challenged the authority of the federal government to conduct the foreign relations of the United States by determining that the United States would comply with an ICJ decision in a case to which the United States was a party. Far from being moot, resolution of the issues presented in the Petition will determine not only whether Mr. Medellín, but also the 50 other Mexican nationals subject to the *Avena* judgment whose cases are currently pending in the courts of the United States, will receive the review and reconsideration to which the President, in accordance with *Avena*, has determined they are entitled.

In any event, Texas's claim that Mr. Medellín has already had "review and reconsideration" misunderstands the obligation imposed by *Avena* and the President's determination. The relief ordered by the President in order to give effect to *Avena* is unequivocally prospective. In fact, the so-called merits review of Mr. Medellín's Vienna Convention claim by the state trial court in 2001 was before the ICJ when the ICJ found that the United States must provide judicial "review and reconsideration" of Mr. Medellín's conviction and sentence as a remedy for the treaty violation in his case. *Avena* ¶¶ 121-122, 153(9) (Pet. App. 165a, 185a). The Texas trial court's findings of fact and conclusions of law from the state post-conviction proceedings in Mr.

Medellín's case were submitted to the ICJ, and the parties discussed the trial court's disposition, as well as the subsequent CCA appeal and federal habeas proceedings in their briefing. *See* Brief Amicus Curiae of the Government of the United Mexican States at 23, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). On this record, the ICJ rejected the argument of the United States that it was already in compliance with the required remedy, and concluded that the United States was still required to give "review and reconsideration" to Mr. Medellín and 50 other Mexican nationals. *Avena* ¶¶ 130-134, 153(9) (Pet. App. 169a-171a, 185a) (emphasis added). Thus, Texas's suggestion that Mr. Medellín has already been given the remedy required by the *Avena* judgment is, on its face, inconsistent with the *Avena* judgment. The President's determination also makes clear that prospective relief is required, stating that the United States "*will* discharge" its obligations under *Avena* by giving them effect in state court; not that it has already done so. Pet. App. 187a (emphasis added).

Even were it somehow open to the Texas courts to consider whether Mr. Medellín has already received the required review and reconsideration, Texas's argument would fail, because the truncated review of Mr. Medellín's Vienna Convention claim by the Texas trial court in 2001 fails to comport with the requirements of *Avena*. The Texas trial court denied Mr. Medellín *any* opportunity to develop the factual record underlying the violation. *See* Order, *Ex parte Medellín*, No. 675430-A (Tex. 339th Dist. Ct. Jan. 22, 2001), reprinted in Appendix to Petition for Writ of Certiorari, 34a, *Medellín v. Dretke*, 544 U.S. 660 (hereinafter "First Pet. App."); *see also* First Pet. App. 61a. Moreover, the ICJ held that it is "crucial" that the review and reconsideration take

account of the treaty violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right. *Avena* ¶ 139 (Pet. App. 174a). Yet, contrary to Texas's post-hoc gloss on the Texas trial court's decision, the trial court's consideration of Mr. Medellín's Vienna Convention claim conflated the treaty and constitutional claims by considering only whether the treaty violation resulted in a violation of Mr. Medellín's *constitutional* rights. First Pet. App. 56a-57a.[1]

II. *Sanchez-Llamas v. Oregon* Did Not Decide the Issues in This Case.

Texas also argues that this Court's decision in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, somehow resolved the issues in this case. Br. Opp. 14-16. Here again, Texas makes a merits argument that fails to address the issue here: whether this Court could leave unreviewed a Texas judgment that would put the United States in breach of its acknowledged treaty obligations and frustrate the President's decision that the United States would comply.

In any event, as the United States points out, *Sanchez-Llamas* plainly did not address the issues presented. U.S. Br. 20; Pet. 26-27. In *Sanchez-Llamas*, this Court considered the degree of deference due to *interpretations* of a treaty in prior ICJ cases cited *as precedents*. Here, by

[1] The United States made the same point in the oral argument before the Texas Court of Criminal Appeals: "Because previously, the only analysis that I see that was made [by Texas courts] is whether the Vienna Convention violations produced constitutional violations. . . . That does not give full and independent weight to the treaty violation, which is what *Avena* requires and which is what the President has directed." Transcript of Oral Argument, vol. I, at 48-49, *Ex parte Medellin*, No. AP-75,207 (Tex. Crim. App. Nov. 15, 2006).

contrast, the issue is what constitutional mechanisms allow the United States to abide by its undisputed treaty obligation to comply with an ICJ *judgment* itself, regardless of whether the United States courts agree with the interpretation on which the ICJ based its judgment. This Court did not decide the latter question in *Sanchez-Llamas*, because the petitioners in that case were not among the 51 Mexican nationals whose cases were adjudicated by name in *Avena*.

Texas contends that this distinction is irrelevant because ICJ decisions are binding only "between the parties," and "[n]either Medellín nor the State of Texas were parties [*sic*] to the *Avena* decision." Br. Opp. 16. Texas is mistaken.

First, "[i]n international relations . . . the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979) (internal quotation marks omitted); *see also* Pet. 19-20. And the Mexican government, as claimant, represented not only its own rights but also those of Mr. Medellín and the other Mexican nationals whose cases were before the ICJ. *Avena* ¶¶ 38-40 (Pet. App. 124a-127a); *see, e.g., Hines v. Davidowitz*, 312 U.S. 52, 64 (1940) (government has responsibility for "protection of the just rights of a country's own nationals" abroad). Thus, for purposes of the United States' treaty obligation to comply, Texas and Mr. Medellín *were* parties to the *Avena* judgment.

Second, in any event, Texas's attempt to reframe the issue as solely a question of *res judicata* between the *Avena* parties misses the point. The United States has a binding obligation, under treaties ratified by the President with the advice and consent of the Senate, to abide by the *Avena* judgment. *See* U.N. Charter art. 94; ICJ

Statute arts. 59-60; *see also* Pet. 24-25. By the Supremacy Clause, those ratified treaties are "the supreme Law of the Land" in the same manner as federal statutes. U.S. CONST. art. VI; *see also, e.g., Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884). And under the *Avena* judgment, the United States is required to give "review and reconsideration" to the convictions and sentences of Mr. Medellín and the other 50 Mexican nationals in their own cases. *See, e.g., Avena*, ¶¶ 121, 141 (Pet. App. 165a, 174a). To the extent a Texas state criminal procedure statute stands as an obstacle to the nation's compliance with this treaty obligation, it is preempted by operation of the Supremacy Clause. *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31 (1942).[2]

Finally, in this case, the President has acted to give effect to the United States' undisputed treaty obligation to abide by the *Avena* judgment. Texas, however, has claimed a right to defy the federal government's foreign relations authority. Again, Texas's stance is preempted under the Supremacy Clause. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003).

III. Texas's Challenge to Presidential and Federal Power Underscores the Need For Review.

Texas also attempts to defend the merits of the Texas court's ruling that the President exceeded his constitu-

[2] Texas points out that the UN Charter provides for Security Council referral if a nation does not voluntarily comply with its obligations under an ICJ judgment. Br. Opp. 16. However, the question in this case is not what happens internationally if the United States breaches its obligations, but rather what mechanism the United States Constitution provides domestically to allow the United States to comply with those obligations. The latter question is a question of United States constitutional law rather than treaty interpretation, and it is not a question that the Court answered in *Sanchez-Llamas*.

tional and statutory authority in directing that the *Avena* judgment should be given effect in state courts. Again, Texas's argument only serves to confirm the reasons for a grant of certiorari on the petition. Where, as here, a state court has held unconstitutional an exercise of federal power in the area of foreign relations, review by this Court is imperative to resolve the federal-state conflict and to ensure "uniformity in this country's dealings with foreign nations," *Garamendi*, 539 U.S. at 413, regardless of the ultimate outcome.[3]

In any event, Texas again is wrong on the merits. Its argument rests not only on the mistaken notion that *Sanchez-Llamas* held that ICJ judgments have no effect in U.S. courts, *see supra* Part II, but also on the further leap that the relevant treaties do not constitute federal law that the President can implement. Texas fundamentally misunderstands the nature of treaty obligations.

Nations enter into treaties intending to be bound by their promises. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 cmt. a (rule that treaties shall be obeyed [*pacta sunt servanda*] "lies at the core of the law of international agreements and is perhaps the most important principle of international law"). Likewise, nations agree to adjudication before international arbitral or judicial bodies intending to be bound by the result. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899); *see also* UN Charter art. 94; ICJ Statute arts. 59-60. While a foreign nation

[3] Moreover, though Texas fails to acknowledge it, Oklahoma's highest court has granted review and reconsideration under *Avena* to a Mexican national named in the *Avena* judgment. *See Torres v. State*, 2005 OK CR 17, 120 P.3d 1184 (Okla. Crim. App. 2005) (cited in Pet. 29). At a minimum, review is appropriate to resolve this split in authority.

may take "diplomatic or political" actions (Br. Opp. 22), among others, in response to a breach of these legal obligations, that fact does not deprive the obligations of their binding or legal character. The Supremacy Clause incorporates these international legal obligations into United States domestic law, by providing that "*all* Treaties" made by the United States are the "supreme Law of the Land." U.S. CONST. art. VI (emphasis added). Texas's attempt to recast compliance with this legal obligation as a mere courtesy to a foreign government is baseless.

Moreover, as explained in the petition, Congress has authorized the President to carry into effect judgments of the ICJ to which the United States was a party. Pet. 21-22.

Texas also has no basis for its suggestion that an additional executive agreement would be needed for the President to give effect to an already acknowledged obligation under an existing, ratified treaty. The United States does not need Mexico's permission to do what, by constitutionally prescribed treatymaking processes, it has already agreed to do. *See* U.S. Br. 17; Mex. Br. 7-10. And in any event, though Texas ignores it, such an executive agreement is effectively in place. Both the United States and Mexico have agreed that the United States is required to grant review and reconsideration in accordance with the *Avena* judgment, and that review in state court is an acceptable way to accomplish at least part of this obligation. *See* U.S. Br. 7-8; Mex. Br. 6-7, 10. No formalities are needed for an Executive Agreement; as petitioner has noted, this Court has inferred such an agreement from exchanges of correspondence or even from the congressional testimony of Executive Branch officials. Pet. 23 (citing *Garamendi*, 539 U.S. at 421-23, and *United States v. Belmont*, 301 U.S. 324, 326 (1937)).

Here, the agreement is evident from the *amicus* briefs that both governments have filed with this Court.

Finally, Texas's suggestion that the United States has unconstitutionally interfered with the operations of the state courts is without merit. Texas's own laws authorize its courts to hear habeas corpus petitions to review convictions and sentences. *See* Tex. Crim. Pro. Code, art. 11.071. Far from intruding on state sovereignty, allowing state courts to resolve federal issues in the state criminal process has always been viewed as a sign of "proper respect for state functions." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also* 28 U.S.C. § 2254(b)(1) (requiring exhaustion of remedies in state court before filing federal habeas). Conversely, a state court must show proper respect for federal law, and it may not refuse to exercise jurisdiction based on an unwillingness to enforce federal law. *See Testa v. Katt*, 330 U.S. 386 (1947). While state courts ordinarily are free to follow their own procedures, they may not do so where, as here, the procedure itself is inconsistent with a federal right or eliminates any reasonable opportunity to assert the federal right. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990). In any event, the stark federal-state conflict that Texas posits only illustrates the need for this Court to grant review.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant a writ of certiorari.

Respectfully submitted,

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April 4, 2007

FILED
MAR 2 2 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 06-984

In the Supreme Court of the United States

JOSE ERNESTO MEDELLIN, PETITIONER

v.

STATE OF TEXAS

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

In the *Case Concerning Avena & Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31) (*Avena*), the International Court of Justice decided that, to remedy violations of the Vienna Convention on Consular Relations, *done*, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S., in the cases of 51 named Mexican nationals, including petitioner, the United States must provide review and reconsideration of their convictions and sentences through a judicial process to determine whether treaty violations caused actual prejudice, without regard to procedural default rules. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the decision by giving those 51 Mexican nationals review and reconsideration in the state courts. The Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the President's determination or the *Avena* decision. The questions presented are:

1. Whether the President of the United States acted within his authority under the treaties, statutes, and Constitution of the United States when he determined that the United States will comply with its treaty obligations by having state courts give effect to the *Avena* decision in the cases of the 51 Mexican nationals addressed in the decision.

2. Whether, absent the President's determination, a private party could enforce the *Avena* decision in state court.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the questions whether the President validly determined that the United States will discharge its international obligations under the decision of the International Court of Justice (ICJ) in *Case Concerning Avena & Other Mexican Nationals* (*Mex.* v. *U.S.*), 2004 I.C.J. 128 (Mar. 31) (*Avena*), by having state courts give effect to the *Avena* decision, and whether, apart from the President's determination, the ICJ's decision would be privately enforceable in state courts. Because those questions involve the lawfulness of a Presidential determination and the effect of the decision below is to undermine his determination of how the United States will comply with its treaty obligations, the United States has a substantial interest in the resolution of those questions. The United States filed a brief in this Court addressing those issues in *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam). It also filed a brief in the Texas Criminal Court of Appeals.

STATEMENT

1. In 1969, after the Senate provided its advice and consent, see 115 Cong. Rec. 30,997, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention), *done*, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Vienna Convention, 21 U.S.T. 100-101, 596 U.N.T.S. at 292-293, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36(1)(a) states that "consular officers shall be

free to communicate with nationals of the sending State and to have access to them." 21 U.S.T. at 101, 596 U.N.T.S. at 292.

Article 36 further states that "[i]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292. In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." *Ibid.* State authorities "shall inform the person concerned without delay of his rights under [Article 36]." *Ibid.*

Article 36(1)(c) also states that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." 21 U.S.T. at 101, 596 U.N.T.S. at 292. It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." *Ibid.* At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." *Ibid.*

The rights referred to in Article 36(1), 21 U.S.T. at 100-101, 596 U.N.T.S. at 292, "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292-293. That requirement "is subject to the proviso, however, that the said laws and regulations must enable full

effect to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.*

An Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), *done*, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, which the United States ratified in 1969, Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488, and from which it withdrew on March 7, 2005, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2675 (2006), provides that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." 21 U.S.T. at 326, 596 U.N.T.S. at 488. Any party to the Optional Protocol may bring such disputes before the ICJ. *Ibid.*

Article 94 of the Charter of the United Nations (U.N. Charter), 59 Stat. 1051, which is also a Treaty ratified by the United States, provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Article 59 of the Statute of the International Court of Justice (ICJ statute), 59 Stat. 1055, 1062, which is incorporated into the U.N. Charter, provides that the decision of the ICJ "has no binding force except between the parties and in respect of that particular case." Only nations may be parties to cases before the ICJ. Art. 34, 59 Stat. 1059.

2. Petitioner, a Mexican national, was convicted of participating in the gang rape and murder of two teenage girls and was sentenced to death. Pet. App. 2a. On direct review, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Ibid.*

Petitioner then filed a habeas action in state court, claiming for the first time that Texas's failure to inform him of his rights under the Vienna Convention required

reversal of his conviction and sentence. Pet. App. 2a. The state trial court rejected that claim on several grounds, including that petitioner had procedurally defaulted that claim by failing to raise it at trial. *Ibid.* The Texas Court of Criminal Appeals affirmed. *Id.* at 2a-3a.

3. Petitioner then sought federal habeas corpus relief, based on his Vienna Convention claim. Pet. App. 3a. The district court rejected that claim. *Ibid.* While petitioner's application for a certificate of appealability was pending in the Fifth Circuit, the ICJ issued its decision in *Avena*. *Id.* at 86a-186a.

In *Avena*, ICJ determined that the United States had violated Article 36(1)(b) of the Vienna Convention, 21 U.S.T. at 101, 596 U.N.T.S. at 292, by not informing 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. Pet. App. 183a, para. 153(4) and (5). The ICJ determined that the appropriate remedy for those violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." *Id.* at 185a, para. 153(9). The ICJ indicated that review and reconsideration should occur through a judicial process, *id.* at 174a, paras. 140-141, that the relevant inquiry was whether a violation caused actual prejudice to the defendant, *id.* at 165a, para. 121, and that procedural default rules could not bar that review. *Id.* at 160a-161a, para. 113.

The Fifth Circuit denied petitioner's application for a certificate of appealability. *Medellin* v. *Dretke*, 371 F.3d 270 (2004), cert dismissed, 544 U.S. 660 (2005). It held

that petitioner had procedurally defaulted his Vienna Convention claim and that the Vienna Convention does not confer an individually enforceable right. *Id.* at 280. This Court granted review. See *Medellin* v. *Dretke*, 543 U.S. 1032 (2004).

Before the Court heard argument in *Medellin*, three significant events occurred. First, on February 28, 2005, the President issued a determination that "the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (*Avena*), 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Pet. App. 187a. Second, on March 7, 2005, the United States gave notice of its withdrawal from the Optional Protocol. See *Sanchez-Llamas* 126 S. Ct. at 2675. Third, relying on the President's determination and the *Avena* decision, petitioner filed an application in the Texas Court of Criminal Appeals for state habeas corpus review. Pet. App. 4a-5a.

After argument, this Court dismissed the petition for a writ of certiorari in *Medellin* as improvidently granted. *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam). The Court explained that it had taken that action because the recently initiated state proceeding might provide petitioner with the review and reconsideration he sought, and because threshold procedural issues could independently bar federal habeas review. *Id.* at 664.

4. The Texas Court of Criminal Appeals subsequently dismissed petitioner's application for state habeas corpus relief. Pet. App. 1a-79a. The court held that the *Avena* decision and the President's determination "do

not constitute binding federal law" and therefore do not preempt the State's prohibition against the filing of successive applications for state habeas corpus relief. *Id.* at 64a.

The court rejected petitioner's reliance on the *Avena* decision as a source of binding law based on this Court's decision in *Sanchez-Llamas*. Pet. App. 20a-24a. Noting this Court's statement that determining the meaning of treaties that are given effect as federal law is the "province and duty of the judicial department," 126 S. Ct. at 2684 (internal quotation marks omitted), the court interpreted *Sanchez-Llamas* to hold that "ICJ decisions are not binding on United States courts." Pet. App. 24a.

With respect to the President's determination, a four-judge plurality of the court ruled that the President "has exceeded his constitutional authority by intruding into the independent powers of the judiciary" to determine "what law to apply" and "how to interpret the applicable law." Pet. App. 30a. Referring to the framework for review of Presidential action proposed by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952), the plurality first examined whether the President's action was supported by his "inherent foreign affairs power." Pet. App. 30a. The plurality concluded that the President's action could not be upheld under cases recognizing the President's foreign-affairs authority to resolve an international dispute through an executive agreement, because the President's action in this case constituted a "unilateral act." *Id.* at 43a.

The plurality next rejected the United States' argument that the United States' ratification of the U.N. Charter and Congress's enactment of federal statutes pertaining to the United Nations implicitly give the

President authority to determine how to respond to an ICJ decision. Pet. App. 53a-55a. The plurality reasoned that "[t]he President is still bound by the Constitution when deciding how the United States will respond to an ICJ decision," and that, for the reasons already given, "the President exceeded his implied foreign affairs power by directing state courts to give effect to *Avena*." *Id.* at 55a.

Presiding Judge Keller filed a concurring opinion. Pet. App. 64a-71a. She concluded that the President's determination violated principles of federalism because, in her view, no treaty authorized the President's determination, and its validity therefore turned on a balance of strength of federal and state interests. Here, she believed, the national interest served by the President's determination is "attenuated," while the State's interest in criminal justice is "fundamental." *Id.* at 69a.

Judge Cochran also filed a concurring opinion. Pet. App. 76a-79a. She concluded that, because the President's determination took the form of a memorandum to the Attorney General, rather than a Presidential Proclamation or an Executive Order, it could not create binding federal law. *Id.* at 78a-79a.

ARGUMENT

I. REVIEW IS WARRANTED ON THE QUESTION WHETHER THE PRESIDENT VALIDLY DETERMINED TO HAVE STATE COURTS GIVE EFFECT TO *AVENA*

The decision of the ICJ in *Avena* imposed an international law obligation on the United States to accord review and reconsideration through a judicial process in the cases of the individual defendants addressed in that decision. Although the President does not agree with the ICJ's interpretations of the Vienna Convention, the

President recognized that the United States had, pursuant to the Optional Protocol, agreed to resolution of the dispute by the ICJ, and that it is answerable under the U.N. Charter for any failure to comply. To discharge its international obligations under *Avena*–and thereby to protect the interests of United States citizens abroad, promote the effective conduct of foreign relations, and underscore the United States' commitment in the international community to the rule of law–the President determined to have state courts provide review and reconsideration under *Avena* of the convictions and sentences imposed, while also withdrawing from the Optional Protocol. See *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2685 (2006). The decision of the Texas Court of Criminal Appeals to invalidate the President's action frustrates the Executive's determinations in this sensitive area, and thwarts the intent of the Optional Protocol and U.N. Charter to confer upon the President adequate authority and responsibility to carry out the Nation's treaty obligations. That decision warrants this Court's review.

A. Because The Decision Below Invalidated An Action Of The President On A Matter Of International Importance, Review By This Court Is Warranted

The Texas Court of Criminal Appeals expressly held that the President exceeded his authority in having state courts give effect to the *Avena* decision. A majority of the court concluded that the President lacked authority under the treaties, statutes, and Constitution of the United States to ensure that the United States complies with the *Avena* decision. A state court decision invalidating such an action of the President and effectively

frustrating efforts to comply with international treaty obligations clearly warrants this Court's review.

The President's determination that state courts give effect to the *Avena* decision was intended to discharge the United States' international law obligation to comply with that decision and reflects the President's considered judgment that the United States' foreign policy interests in meeting its international obligations and protecting Americans abroad require the United States to comply with the ICJ's decision. In setting aside the President's determination, the Texas Court of Criminal Appeals has not only decided fundamental questions of federal law relating to the authority of the President to bring the United States into compliance with its treaty obligations. It has also set a course that, if not reversed, will place the United States in breach of its international law obligation to comply with the *Avena* decision, leave unresolved the dispute between Mexico and the United States over the treatment of petitioner, and frustrate the President's judgment that foreign policy interests are best served by giving effect to that decision. The importance of the question of the Presidential authority resolved by the Texas Court of Criminal Appeals, and the foreign policy ramifications of that decision, make the need for this Court's review manifest.

In *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam), even before the President issued his determination, this Court granted review on the question whether the *Avena* decision should be given effect in the domestic courts of this country. The Court dismissed the petition for a writ of certiorari as improvidently granted only because the Texas courts might provide the relief that petitioner sought and because there were potential procedural barriers to consideration of the effect of the

President's determination and the *Avena* decision on federal habeas corpus review. *Id.* at 663-664. In dismissing the petition for a writ of certiorari, the Court anticipated the possibility of review following the state courts' disposition of petitioner's state habeas petition. *Id.* at 664 n.1. Similarly, in a concurring opinion, Justice Ginsburg, joined by Justice Scalia, noted that "[t]he Texas courts are now positioned immediately to adjudicate these cleanly presented issues in the first instance," and "[i]n turn, it will be this Court's responsibility, at the proper time and if need be, to provide the ultimate answers." *Id.* at 672 (Ginsburg, J., joined by Scalia, J.).

The Texas Court of Criminal Appeals has now ruled on the question of the President's authority to require state courts to give effect to the *Avena* judgment, and there are no procedural barriers to the consideration of that issue. The Court should grant the petition for a writ of certiorari to resolve that issue.

B. The President Had Authority Under The Treaties, Statutes, And Constitution Of The United States To Require State Courts To Give Effect To The *Avena* Decision

The Texas Criminal Court of Appeals erred in holding that the President lacked authority to ensure the United States' compliance with its international obligation by having state courts give effect to the *Avena* decision. The President's authority to implement the *Avena* decision flows directly from the combination of two treaties–the Optional Protocol and the U.N. Charter–as informed by the President's unique role in foreign affairs, his statutory responsibilities, and his traditional authority in judicial proceedings implicating international law. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the

President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

Through ratification of the Optional Protocol, the United States agreed to submit to the ICJ for resolution "[d]isputes arising out of the interpretation or application of the Convention." Optional Protocol, Art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. Through ratification of the U.N. Charter, the United States agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." Art. 94(1), 59 Stat. 1051. And it further agreed that the ICJ's decision would have "binding force * * * between the parties and in respect to that particular case." Article 59 of the ICJ statute, 59 Stat. 1062. The combined effect of those treaty provisions is that the *Avena* decision has "binding force" on the United States, and the United States has an obligation "to comply with the decision" by providing review and reconsideration to 51 individuals.[1]

The authority to decide whether this Nation will comply with an ICJ decision, and, if so, how compliance should be achieved, falls on the President. The Optional Protocol and the U.N. Charter implicitly delegate that authority to the President, consistent with the President's role as the representative of the Nation in foreign affairs and in resolving disputes under those treaties. Several considerations support that conclusion.

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[1] The term "decision" refers to what in United States practice would be called the judgment, and it is only that portion of an ICJ opinion with which the United States must comply. The United States does not have an international obligation to acquiesce in or follow the legal reasoning of an ICJ opinion, and it has not acquiesced in the legal reasoning of *Avena*. See *Sanchez-Llamas*, 126 S. Ct. at 2685.

1. First, the questions whether to comply with an ICJ decision and if so, through what means, raise sensitive foreign policy issues and often call for a prompt response. Because the President is uniquely positioned both to evaluate and resolve sensitive foreign policy issues and to act with dispatch, the Optional Protocol and the U.N. Charter are most sensibly read to entrust the President with the responsibility of deciding how to respond to an ICJ decision.

In this case, for example, the President was best positioned to balance the harm from complying with a decision with which he disagreed against the adverse consequences to the conduct of foreign affairs and to American citizens abroad that would attend defiance of the decision. The President resolved those competing considerations by having state courts give effect to the *Avena* decision with respect to 51 individuals on whose behalf Mexico brought the ICJ case, while withdrawing from the Optional Protocol, so as to foreclose the possibility that the ICJ would apply its erroneous interpretation in future cases that might bind the United States under international law. Because the President was unquestionably in the best position to weigh the strength of those competing considerations, and to balance them in light of global foreign policy concerns, the applicable treaties are logically understood as delegating to the President the authority to strike the appropriate balance for the Nation.

2. In addition, Congress has expressly authorized the President to direct all functions connected with the United States' participation in the United Nations. See 22 U.S.C. 287, 287a. Pursuant to that authority, the President represents the United States in cases before the ICJ. The President also has responsibility to repre-

sent the United States before the Security Council if the United States were to decide not to comply with an ICJ decision, and a party to the decision were to seek to enforce the decision in the Security Council pursuant to Article 94(2), 59 Stat. 1051. A logical and coherent scheme is established when the same person who represents the United States before the ICJ and before the Security Council in the event of an enforcement action for failure to comply with an ICJ decision also has authority to decide how the Nation should respond to an ICJ decision and to carry out the Nation's international obligations if he so determines.

3. Authorities that the President exercises in a number of different international law areas also support interpreting the Optional Protocol and the U.N. Charter to recognize and confer Presidential authority to respond to an ICJ decision and to take actions necessary for the Nation to comply.

a. The task of responding to an ICJ decision has significant parallels to the President's established dispute resolution authority. In a series of cases, the Court has held that the President may settle disputes with foreign nations involving the claims of particular individuals through executive agreements that do not require advise and consent by the Senate or approval by Congress. *American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 682-683 (1981); *United States* v. *Pink*, 315 U.S. 203, 223 (1942); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). For example in *Garmendi*, after the President reached an international agreement to resolve Holocaust-era claims, the Court held that a state law that clearly conflicted with the express federal policy reflected in the President's determination was preempted. Similarly, in

Dames & Moore, the Court upheld a Presidential order suspending claims in American courts in order to effectuate the terms of an executive agreement resolving claims between the United States and Iran. As those and other cases illustrate, executive branch agreements with foreign governments to resolve disputes affecting the claims of specific individuals can validly preempt state law. *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 310 U.S. at 327, 331.

In crucial respects, the President exercises a more modest power in responding to an ICJ decision than the power he exercised in the cases cited above. The range of possible international disputes subject to executive settlement is potentially quite extensive, while the responsibility for complying with particular ICJ decisions is constrained by the particular decision and the relatively narrow scope of disputes subject to ICJ jurisdiction. Moreover, in each of the settlement cases, the President decided on the terms of the settlement without approval from the Senate or Congress. In the present context, by contrast, the Senate, by a two-thirds majority, U.S. Const. Art. I, § 3, Cl. 2, gave its advice and consent to both the Optional Protocol and the U.N. Charter, and those treaties, in combination, expressly authorize the ICJ to issue a binding resolution of a dispute arising under the Vienna Convention. Once the ICJ issues such a Senate-authorized resolution of a dispute, only the question of implementation of that resolution remains. In light of the President's established authority to resolve disputes with a foreign government without Senate or congressional approval, the Optional Protocol and the U.N. Charter should be understood to recognize, and to provide the President with, the more modest implementation authority at stake here.

b. The President's implied authority under the Optional Protocol and the U.N Charter to implement an ICJ decision also follows logically from the President's established authority to file suit to enforce a Treaty without express treaty or statutory authorization. *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925). If, as *Sanitary District* makes clear, the President has authority to sue a State to enforce the United States' treaty obligation to give effect to the *Avena* decision, the President also has authority to require States to implement the *Avena* decision without the need for coercive and disruptive litigation.

c. The President's claim of authority under the Optional Protocol and the U.N. Charter to implement an ICJ decision also draws strength from other contexts in which the Executive Branch has exercised authority to determine authoritatively whether an international rule of law should be applied in domestic courts. For example, before enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, the Executive Branch determined whether a foreign sovereign should receive immunity from suit, and courts gave effect to Executive Branch determinations. See *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 486 (1983). Similarly, the Executive Branch authoritatively determines what governments are entitled to sue in our courts. *Pfizer, Inc.* v. *India*, 434 U.S. 308, 319-320 (1978). And the Executive Branch also authoritatively determines whether a treaty remains in force. See *Terlinden* v. *Ames*, 184 U.S. 270, 285 (1902).

4. Practice also supports the President's claim of authority under the Optional Protocol and the U.N. Charter to respond authoritatively to an ICJ decision. During the time that the United States has submitted dis-

putes to the ICJ for resolution, the ICJ has rendered five decisions that have called for implementation by the United States, including *Avena*.[2] In each case, the President, or the Executive Branch acting on Presidential authority, made the decision on how to respond to the ICJ decision. And in each case, Congress acquiesced in the President's response. Cf. *Dames & Moore*, 453 U.S. at 678 (finding relevant a "history of congressional acquiescence" in Presidential authority).

5. Finally, the Presidential determination at issue in this case also falls comfortably within the President's implied authority under the Optional Protocol and the U.N. Charter because it intrudes no more on state authority than is necessary to fulfill the United States' treaty obligation to comply with *Avena*. As *Avena* requires, the President's determination requires review and reconsideration, without regard to procedural default principles, but it did not divest state courts of authority to resolve the underlying claims. Nor did the President require state courts to reach a particular result with respect to those claims. The President instead required only that, for 51 Mexican nationals, the States that failed to comply with the Vienna Convention with respect to those individuals determine whether the State's violation prejudiced the defense. That process respects the State's traditional role in evaluating the merits of the claims of those who seek to overturn their

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[2] See *Case Concerning Rights of Nationals of the United States of America in Morocco* (*Fr.* v. *U.S.*), 1952 I.C.J. 176 (Aug. 27); *Case Concerning Military & Paramilitary Activities In & Against Nicaragua* (*Nicar.* v. *U.S.*), 1986 I.C.J. 14 (June 27); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Can.* v. *U.S.*), 1984 I.C.J. 246 (Oct. 12); *LaGrand Case* (*F.R.G.* v. *U.S.*), 2001 I.C.J. 466 (June 27).

state law criminal convictions or sentences, while ensuring that the United States discharges its treaty-based international law obligation. Indeed, the result here is less intrusive than the complete displacement of state causes of action through the President's well established authority to settle international disputes.

C. The Reasons Offered By The Court Below For Invalidating The President's Determination Are Unpersuasive

No majority of the court below joined a single opinion invalidating the President's determination. The various opinions, however, offer three principal rationales. None is persuasive.

1. First, the plurality reasoned that the President's action is invalid because it takes the form of unilateral action, rather than an agreement with Mexico. Pet. App. 43a. That rationale ignores the crucial fact that the United States and Mexico had already agreed through the Optional Protocol and the U.N. Charter to resolve their dispute by submitting it to the ICJ for a binding decision. Once the ICJ issued its decision, a second agreement would be superfluous. The President simply had to decide whether to implement a previously agreed-upon resolution.

The plurality's rationale also needlessly hamstrings the President's authority to fulfill the United States' international law obligations. Securing yet another agreement may be a time-consuming process when the President has determined that swift action is required. A government may be unwilling to enter a successive agreement, yet be willing to acquiesce in the President's implementation of a preexisting one. And the precondition imposed by the plurality would effectively give a foreign government a veto power over the President's exercise of authority under treaties of the United States.

2. In a separate opinion, Presiding Judge Keller concluded that the President's determination violated principles of federalism because she viewed the national interest served by the President's determination as weak, and the State's interest in failing to comply with the President's determination as strong. Pet. App. 69a-71a. But where, as here, the President acts pursuant to his authority under treaties of the United States, principles of federalism do not stand as an obstacle. To the contrary, federal law is supreme, and state law must give way. See p. 14, *supra*.

In any event, Judge Keller incorrectly weighed the competing federal and state interests. In characterizing the federal interest as weak, Judge Keller failed to take into account the compelling national interests implicated by the President's determination that promoting the international rule of law and protecting Americans abroad require implementation of *Avena*. And Judge Keller overstated the intrusion on the States' interest of having to determine in 51 cases whether their own violations of a Treaty caused prejudice to the defendant. That interest, while not insubstantial, is far outweighed by the federal interests supporting the President's determination. Moreover, much of the intrusion on state interests is inherent in the Vienna Convention itself. That Convention involves an international obligation of the United States that clearly extends, by virtue of the Supremacy Clause, to state and local laws. The additional intrusion on States that occurs when an international tribunal imposes an obligation on the United States through a decision made binding by the Optional Protocol and the U.N. Charter pales in comparison with the federal interest in treaty compliance.

3. Finally, Judge Cochran concluded that because the President's determination took the form of a memorandum to the Attorney General, rather than a Presidential Proclamation or an Executive Order, it could not create binding federal law. Pet. App. 76a-79a. Nothing in United States Constitution, however, requires a Presidential directive to take any particular form. What is crucial here is that the terms of the President's determination make clear that it was intended to have the legal effect of discharging the United States' obligation by having state courts give effect to the *Avena* decision in the case of 51 identified individuals. *Id.* at 187a. Nothing more was required.

II. WHILE THE *AVENA* DECISION IS NOT PRIVATELY ENFORCEABLE, THE UNITED STATES DOES NOT OPPOSE REVIEW OF THAT QUESTION

Petitioner contends (Pet. 24-26) that the *Avena* decision is privately enforceable because the Optional Protocol and the U.N. Charter obligate the United States to comply with the decision. For the reasons previously discussed, however, the Optional Protocol and the U.N. Charter give the President the authority to decide whether the United States will comply with an ICJ decision, and if so, what measures should be taken to comply. Allowing private enforcement, without the President's authorization, would undermine the President's ability to make those determinations. Cf. *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005). Thus, far from being supported by the Optional Protocol and the U.N. Charter, private enforcement of an ICJ decision conflicts with those treaties. See Brief for the United States as Amicus Curiae in *Medellin* at 33-38 (No. 04-5928).

Moreover, while the Optional Protocol and the U.N. Charter together create an obligation to comply with an ICJ decision, nothing in the text of those treaties suggests that an ICJ decision was intended to be privately enforceable. Cf. *Sanchez-Llamas*, 126 S. Ct. at 2679. To the contrary, the ICJ statute, which is incorporated into the U.N. Charter, makes clear both that an ICJ decision is binding only between the parties to the case, Art. 59, 59 Stat. 1062, and that only nations can be parties. Art. 34, 59 Stat. 1059. Accordingly, in the absence of the President's determination, the ICJ's decision could not be privately enforced in court.

The United States nonetheless does not oppose a grant of certiorari on that question, which the Court had granted review to decide in *Medellin* v. *Dretke*. While the Court has since decided *Sanchez-Llamas*, and that decision cuts against petitioner's position, that case involved the question whether an ICJ *interpretation* should be given effect in this country's courts. Because it did not present the question whether an ICJ *decision* should be given effect, it did not resolve that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2007

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Supreme Court, U.S.
FILED
MAR 21 2007
OFFICE OF THE CLERK

No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSÉ ERNESTO MEDELLÍN

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INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, the Governments of Mexico and the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States promised that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and to its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

On March 31, 2004, the ICJ rendered its judgment in *Avena and Other Mexican Nationals*. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31)[hereinafter "*Avena* Judgment"]. The ICJ held that the United States had violated the rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a remedy for those violations, the ICJ held that the United States must provide Mr. Medellín with meaningful review

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[1] No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this *amicus*.

and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36.

On February 28, 2005, President George W. Bush determined that the United States would discharge its international legal obligations under the *Avena* Judgment by having state courts give effect to the ICJ's decision. Mexico welcomed the President's Determination as a substantial step toward fulfilling the United States's obligations to Mexico and the International Court of Justice. Accordingly, Mexico filed an *amicus* brief in the Texas Court of Criminal Appeals in support of Mr. Medellín's argument that the President's Determination constituted binding federal law. Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006) (No. AP-75207).

On November 15, 2006, the Texas Court of Criminal Appeals held that neither the *Avena* Judgment nor the President's Determination constituted binding federal law, brushing aside the legal obligation of the United States to abide by the remedial decree entered against it in an international adjudicative proceeding that it had agreed by treaty to accept as binding. *Ex parte Medellín*, No. AP-75207, 2006 WL 3302639, at *7, *24 (Tex. Crim. App. Nov. 15, 2006.

Mexico has a direct interest in the United States's compliance with the *Avena* Judgment. The very purpose of Article 36 of the Vienna Convention is to permit the parties to that Convention – including Mexico, the United States, and 169[2] other countries – to protect the interests of their

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[2] STATUS OF MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, U.N. TREATY COLLECTION (available at

citizens when they are arrested or otherwise detained while living, working, or traveling abroad. Since well before the trial of Mr. Medellín, Mexico has provided critical resources to aid in the defense of its nationals facing the death penalty. *See, e.g.*, Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. LAW 359, 366-374 (2003). Consular officials provide funding for experts and investigators, assist in gathering documents relevant to the penalty phase defense, assist in conducting mitigation investigations, act as a liaison with Spanish-speaking family members, and most importantly, ensure that Mexican nationals are represented by competent and experienced defense counsel. Not surprisingly, the United States government acknowledges that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) 186 (Nov. 3, 2003).

Mexico respectfully requests that this Court grant certiorari in order to ensure that the United States fulfills its international treaty obligations and grants Mr. Medellín the remedy to which he is entitled.

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http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp) (last visited Mar. 5, 2007).

REASONS FOR GRANTING THE PETITION

I. Mexico and the United States Agreed by Treaty to Submit Disputes About the Vienna Convention to the International Court of Justice for Binding Resolution.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

On January 9, 2003, after determining that the United States had violated the Vienna Convention in virtually every case in which a Mexican national was facing the death penalty, and after unsuccessfully seeking remedies for those nationals through legal and diplomatic channels, Mexico invoked the Optional Protocol and brought suit in the International Court of Justice. *See* Mexico's Application Instituting Proceedings, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), *available at* http://www.icj-cij.org. The United States fully participated in those proceedings, at the conclusion of which the ICJ found that the United States had violated the Article 36 rights of 51 Mexican nationals, including Mr. Medellín. *Avena* Judgment, ¶ 153(4)–(7).

The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. By Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." United Nations Charter, art. 94, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031. By Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1055.

Since both Mexico and the United States consented to the ICJ's jurisdiction and committed to abide by the resulting judgment, Mexico fully expects the United States to implement the ICJ decision. Cordial and cooperative bilateral relations depend strongly upon good faith compliance by each nation with mutually binding treaty obligations. Each nation expects, and must be able to rely upon, its treaty partners to adhere to their obligations. President George W. Bush recognized this cardinal principle of foreign affairs when he issued the February 28 Presidential Determination.

Under both international and United States law, the *Avena* Judgment constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. It has been nearly three years since the ICJ ruled in *Avena*, and the U.S. promise to comply with the ICJ decision remains unfulfilled. Mexico respectfully requests that this Court reverse the judgment of the Texas court and remand the case with instructions to provide the remedy

mandated by the President and International Court of Justice.

II. This Court Should Not Leave Unreviewed a State Court Decision that Violates the United States's Obligations to Mexico.

A. The United States Must Provide Review and Reconsideration of Mr. Medellín's Conviction and Sentence as Required by Avena.

In *Avena*, the International Court of Justice held (by fourteen votes to one, the majority including Judges from both the United States and Mexico) that the United States had violated its obligation under Article 36(1) to inform Mr. Medellín of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment, para. 153(4)-(7). To remedy these violations, the ICJ held that the United States had to provide "review and reconsideration" of Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States's argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The United States agrees that it has an international legal obligation to comply with the *Avena* Judgment. *See* Petition for Writ of Certiorari at 187a, *Medellín v. Texas*, ___ U.S. ___ (Jan. 16, 2007) (No. 06-984). Accordingly, the President determined that the United States would discharge

its obligations under *Avena* by having state courts give effect to the decision. *Id.* The Texas Court of Criminal Appeals, however, held that neither the Avena Judgment nor the Presidential Determination were binding upon it. Specifically, the Texas Court found that the President of the United States had exceeded his executive authority to ensure that the nation complied with its obligations under *Avena*. *Ex parte Medellín*, 2006 WL 3302639, at *24.

The absence of an executive agreement between the United States and Mexico was "central" to the Texas court's plurality decision that the President had exceeded his constitutional powers. *Ex parte Medellín*, 2006 WL 3302639, at *17. The plurality characterized the Presidential Determination as a "unilateral act executed in an effort to achieve a settlement with Mexico," when no actual settlement had been reached. *Id.* at *16. It implied that the United States and Mexico should "negotiate" the conditions under which the United States should carry out its obligations under the *Avena* Judgment, observing that the negotiation process "ensures that each sovereignty is represented and heard." *Id.* "What is ultimately achieved through that process, which invariably involves compromise, will reflect a meeting of the minds--a settlement that embodies the terms, conditions, rights, and obligations agreed to during the negotiation process." *Id.*

The Texas court's decision reflects its utter failure to grasp the nature of the international legal proceedings that led to this litigation. Both the United States and Mexico had already agreed *in advance* to be bound by the *Avena* Judgment by acceding to the Optional Protocol, the United Nations Charter, and the ICJ Statute. *See supra* at 4-5. The *Avena* Judgment represents the "settlement" of Mexico's dispute with the United States, and it fully addresses the "rights and obligations" of the United States with respect to

the remedy owed to Mr. Medellín. The International Court of Justice agrees:

> [T]he ICJ has always taken the view that it would be incompatible with the spirit and the letter of the [ICJ] Statute and with judicial propriety to deliver a judgment the validity of which would be subject to the subsequent approval of the parties or which would have no practical consequences so far as their legal rights and obligations were concerned. . . . Since, furthermore, a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case in question, it is rare for a decision not to be implemented. Generally speaking, those States which accept the jurisdiction of the Court are ready to comply with its decisions.

INTERNATIONAL COURT OF JUSTICE, ICJ HANDBOOK 75 (5th ed. 2004) (citations omitted), *available at* http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf (last visited March 6, 2007). *Cf. La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned").

Accordingly, there is no need for "negotiation" and "compromise," nor are the parties required to reach a "meeting of the minds" with regard to the *Avena* Judgment. Indeed, it was precisely because negotiations had failed to resolve this dispute that Mexico invoked the Optional Protocol and initiated proceedings before the ICJ.

Likewise, there is no need for a negotiation process that will "ensure that each sovereignty is represented and heard," for both Mexico and the United States were

"represented and heard" before the International Court of Justice. A 16-lawyer delegation represented the United States during the one-week hearing in which both nations presented their arguments. The State Department's Legal Adviser, Principal Deputy Legal Adviser, Assistant Legal Adviser for Consular Affairs and Assistant Legal Adviser for United Nations Affairs, an Associate Deputy Attorney General from the Justice Department, and distinguished professors of international law and comparative criminal procedure all argued for the United States. *See Avena* Judgment, preface. Mexico, in turn, was represented by fifteen lawyers, including the legal adviser to the Mexican Foreign Minister, the Chief of Staff for the Under-Secretary for Global Affairs and Human Rights, the Head of the International Litigation Section of the Mexican Foreign Ministry, the Head of the International Law Section of the Mexican Foreign Ministry, and other distinguished professors and advocates. *Id.*

To support its claims before the ICJ, Mexico submitted a 177-page Memorial supported by a 1300-page Annex of documentary evidence and written testimony. In rebuttal, the United States submitted a 219-page Counter-Memorial along with a 2500-page Annex of documentary evidence and written testimony. Both parties' submissions exhaustively examined the factual predicates for the violations in each national's case, and argued all relevant points of law. Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (June 20, 2003); Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (Nov. 3, 2003).

The ICJ's final judgment reflects its careful consideration of the arguments raised by both nations. Although the Court vindicated Mexico's claims that the

United States had violated its international legal obligations in the case of Mr. Medellín and 50 other Mexican nationals, the Court rejected several arguments advanced by Mexico. In doing so, it took pains to respect ongoing capital proceedings in the United States. The Court rejected Mexico's request for a remedy that would have obligated the United States to vacate each national's conviction and sentence without inquiring whether the Article 36 violation affected the fairness of the underlying proceedings. Instead, the Court called upon the United States judiciary to provide a fair process by which the Vienna Convention violations could be fully considered and remedied, on a case-by-case basis.

Finally, although the ICJ took great care to define the parameters of adequate "review and reconsideration," the Court left to the United States the choice of means to implement the Judgment. *Avena* Judgment, ¶154(9). Thus, it is for the United States—not Mexico—to decide which courts are best suited to carry out the process of review and reconsideration. Mexico's interest is in ensuring that each Mexican national subject to the *Avena* Judgment receives full and fair review and reconsideration of his conviction and sentence under the terms set forth in the *Avena* Judgment. As a first step toward fulfilling the ICJ's mandate, Mexico welcomed the Presdential Determination. Had Mexico opposed the President's action, it would not have submitted an amicus brief to the Texas Court arguing that the court should abide by the President's determination.

B. Failure to Review This Case Could Have a Negative Impact on Bilateral Relations Between the United States and Mexico.

As neighbors and trading partners, the United States and Mexico have an extraordinarily close relationship. Inevitably, the two nations have differed on matters ranging from boundary lines and trade practices to the treatment of each country's nationals. When such disagreements have arisen, Mexico and the United States have attempted to resolve them amicably, often through arbitration. Arbitration has staved off armed conflict, resolved boundary disputes and indemnified private investors as well as individuals who claimed personal injury or denial of due process. Both countries have benefited from international arbitration of their disputes. This may explain why "the history of the relations between the United States and Mexico shows a constant endeavor to resort to this means of settlement." A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 1 (1935).

The commitment of both nations to peaceful dispute resolution through arbitration wavered only once, and the results were disastrous. In 1910, the United States and Mexico agreed to arbitration to resolve a long-running border dispute in El Paso, Texas. Convention for the Arbitration of the Chamizal Case, June 24, 1910, U.S.-Mex., 36 Stat. 2481. The Convention established that the decision of the arbitral commission would be "final and conclusive upon both Governments, and without appeal." 36 Stat. 2483. Nevertheless, when the Commission awarded a large portion of the disputed tract to Mexico, the United States refused to comply with the judgment. ALAN C. LAMBORN & STEPHEN P. MUMME, STATECRAFT, DOMESTIC POLITICS, AND FOREIGN

POLICY MAKING: THE EL CHAMIZAL DISPUTE 54-55 (1988). The effects of this decision upon bilateral relations were "significant and lasting," and the United States's refusal to comply became "an integral part of almost every diplomatic issue arising between the two nations" for the following 52 years. SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL DISPUTE 30 (1965). In addition to souring relations between the two countries, *see id.* at 77, the United States's reaction to the judgment led Mexico to reject arbitration as a method of resolving disagreements with United States and British oil companies after President Lázaro Cárdenas nationalized the Mexican oil industry in 1938. *Id.* at 75, 100. Moreover, it led Mexico to temporarily suspend its compliance with the Pious Fund judgment entered by the Permanent Court of Arbitration. See LAMBORN AND MUMME, *supra*, at 171; ANTONIO GÓMEZ ROBLEDO, MEXICO Y EL ARBITRAJE INTERNACIONAL 101 (1965).

In 1963, the United States finally recognized the Chamizal arbitral award. See LISS, supra, at 89. In announcing the decision to comply with the Commission's judgment, President Kennedy acknowledged the United States had been wrong in rejecting the award. See President's Message to the Senate Transmitting the Convention for the Solution of the Problem of the Chamizal, 88th Cong. 1-3 (1963); Transcript of the President's News Conference on Foreign and Domestic Matters, N.Y. TIMES, July 6, 1962, at A8.

Since then, the United States and Mexico have submitted numerous economic disputes to international tribunals for resolution. And in the early 1990s, both nations signed and ratified the North American Free Trade Agreement, which provides unprecedented opportunities for arbitration of disputes between states and private investors

Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779. In *Metalclad v. Mexico*, an arbitral tribunal awarded a United States-based corporation $16.685 million in damages. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF) (Aug. 20, 2000). Although Mexico had vigorously contested Metalclad's claims, it complied with the judgment. Explaining its decision to pay Metalclad in accordance with the tribunal's decision, Mexico reaffirmed its commitment to honor its international obligations, "even when it does not agree with the findings of the international tribunal nor with the way the tribunal works." Eye on Investors, Mexico Pays U.S. Company, N. Y. TIMES, Oct. 29, 2001, at A4.

As the examples above make clear, both the United States and Mexico have long understood that when a dispute is submitted by mutual consent to an international tribunal for resolution – as under the Optional Protocol to the Vienna Convention – the resulting judgment is final and binding. Mexico and the United States are both party to over 50 instruments that provide international dispute resolution mechanisms.[3] If the Texas court's decision is allowed to

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[3] The subject matter of these treaties encompasses topics as diverse as taxation, *see* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18, 1992, U.S.-Mex., art. 26, 1992 U.S.T. LEXIS 193; copyrights, *see* Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731; narcotics, *see* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, art. 32, 1988 U.S.T. LEXIS 194, *80-81; pollution, *see* International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, art. XIII, 12 U.S.T. 2989; aviation, *see* Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Aug. 15, 1960, art. 13, U.S.-Mex., 12 U.S.T. 60; and chemical weapons, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their

stand, Mexico and other nations will begin to doubt the utility of entering into such agreements with the United States.

Finally, if this Court fails to correct the judgment of the Texas court, the United States will breach its obligations to Mexico under the *Avena* Judgment and bilateral relations will suffer as a consequence. As this Court has previously observed,

> [o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of a government, has to do with the protection of the rights of a country's own nationals when those nationals are in another country.

Hines v. Davidowitz, 312 U.S. 52, 64 (1941).

III. The Court Should Grant Review of This Case Now in Order to Protect Human Lives and Prevent Irreparable Damage To U.S.-Mexico Relations.

Mexico initiated proceedings before the ICJ at a time when no Mexican national faced imminent execution in order to ensure that the United States would have ample time to investigate Mexico's claims, present its counter-arguments, and implement any resulting judgment in Mexico's favor. In the three years since the *Avena* Judgment was issued, however, the United States has failed to provide the remedy mandated by the ICJ. During this time, Mr. Medellín and other Mexican nationals have promptly and diligently

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Destruction, *opened for signature* Jan. 13, 1993, art. XIV, 14 U.N.T.S. 45.

pursued their rights under the *Avena* Judgment. Yet to date, only one court has granted judicial review and reconsideration of a Mexican national's conviction and sentence in light of the *Avena* Judgment. *Torres v. State*, 2005 OK CR 17, 120 P.3d 1184 (Okla. Crim. App. 2005).

If the Court were to deny the writ of certiorari in this case, the effects of the Court's decision would be immediate and irreversible. Ten Mexican nationals whose cases the ICJ adjudicated in *Avena* are on death row in Texas and could face imminent execution. On March 7, 2007, the Texas Court of Criminal Appeals denied relief in five of those cases, citing its earlier decision in *Ex parte Medellín*.[4] Execution of those nationals without providing the remedy mandated by the ICJ would unquestionably affect bilateral relations between the United States and Mexico. Granting review in a later case would not suffice to cure this injury, since the rights of those Mexican nationals would no longer be capable of vindication.

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[4] These five cases were resolved jointly in a one-page, unpublished decision on March 7, 2006. The individual cases decided were: *Ex parte Cesar Roberto Fierro*, No. WR-17,425-05; *Ex parte Ignacio Gomez*, No. WR-52,166-02; *Ex parte Humberto Leal Garcia*, No. WR-41,743-02; *Ex parte Roberto Moreno Ramos*, No. WR-35,938-02; *Ex parte Ruben Ramirez Cardenas*, No. WR-48,728-02; *Ex parte Felix Rocha Diaz*, WR-52,515-03.

CONCLUSION

Amicus curiae the Government of Mexico respectfully urges this Court to grant Mr. Medellín's petition for certiorari.

Respectfully submitted,

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No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF INTERNATIONAL COURT OF JUSTICE EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law, international dispute settlement, and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the obligations arising from a final judgment of the ICJ interpreting a treaty of the United States in proceedings in which the United States participated fully, and the respect that should be accorded to the judgment by all courts in the United States, in the context of a petition to allow review and reconsideration of a conviction and death sentence.

Amici limit their submission to questions concerning the ICJ judgment interpreting the consular treaty and the rights that individuals may assert under that judgment and treaty in U.S. courts. They do not take a position on the death penalty as such; indeed, *Amici* occupy diverse points on the spectrum of opinion about the death penalty, as well as on other political controversies. *Amici* are united in the view that an ICJ judgment interpreting and applying a treaty, rendered in a case to which the United States was party and addressing the claims of certain named foreign nationals, is binding on all courts in the United States to which claims under the treaty may be presented in respect of each of the individuals subject to the judgment; that state courts are required to apply the treaty in the manner specified in the judgment; that state procedural default rules cannot foreclose the exercise of treaty rights to a hearing as held by the ICJ in its judgment concerning those individuals;

---

1. No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

and that petitioner has the right under the judgment to review and reconsideration of his conviction and sentence. This Court is the proper organ within our federal system to ensure that the state courts comply with the ICJ judgment.

SUMMARY OF ARGUMENT

Petitioner is one of 49 Mexican nationals currently on death row in state courts in the United States, who are covered by the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 ICJ No. 128. All those covered by *Avena* are similarly situated, in that they were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, to contact the Mexican consular post, were convicted and sentenced to death without benefit of timely consular services, and have been held by the ICJ to be entitled to review and reconsideration of their convictions and sentences as a remedy for that treaty violation – a violation that the United States has acknowledged.

The court below erred in denying the relief that the ICJ has found to be required to redress the treaty violations in *Avena*. *Avena* resulted from a treaty-based judicial process to which the United States fully consented, in which the United States fully participated, and which binds the United States as a whole. The United States consented to the jurisdiction of the ICJ to decide this dispute and is obliged under Article 94 of the U.N. Charter, Article 59 of the ICJ Statute, and the Vienna Convention and its Optional Protocol – four treaties that were in force for the United States at the time of *Avena* – to carry out the judgment. All courts in the United States are obliged to exercise their judicial powers within their respective jurisdictions consistently with the *Avena* judgment.

The petition should be granted to resolve an unsettled important question of federal law involving the national interest in treaty compliance. The Texas court of last resort reached a result that is incorrect and conflicts with the final disposition of a comparable matter by the court of last resort in Oklahoma.

This Court has not yet ruled on the effects in state and federal law of an ICJ judgment addressing treaty-based rights of specific individuals covered by the judgment. This Court should allow plenary review to prevent a misinterpretation of its prior rulings from obstructing U.S. compliance with its international obligations.

ARGUMENT

I. The Court Should Grant The Writ To Settle The Effects Within U.S. Law Of A Binding Judgment Of The International Court Of Justice In Respect Of Individuals Covered By The Judgment.

The Texas Court of Criminal Appeals erred in taking this Court's decision in *Sanchez-Llamas v. Oregon*, 548 U.S. ___, 126 S. Ct. 2669 (2006), to stand for the proposition that "*Avena* is not binding federal law" in respect of an individual covered by *Avena* itself. App. to Pet. for Cert., p. 20a; *see also* p. 24a, pp. 63a-64a. In declining to apply *Avena*'s reasoning for the benefit of petitioners Sanchez-Llamas and Bustillo, whose cases were not before the ICJ in *Avena*, this Court did not prejudice the binding force of the *Avena* judgment as an international obligation of the United States, and as a treaty-based obligation binding state courts under the Supremacy Clause of the U.S. Constitution, in cases to which *Avena* by its terms applies. The question of *Avena*'s effects on proceedings pending in the United States concerning individuals covered by *Avena* was not before this Court in *Sanchez-Llamas*; it is now properly presented in the instant petition.

A. The *Avena* Judgment is Binding in International Law.

Under Article 94(1) of the Charter of the United Nations, 59 Stat. 1031, T.S. 993 (1945), "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Under Article 59 of the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], which

is annexed to the U.N. Charter and is an integral part thereof,[2] decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added). As the ICJ has recently explained, "Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case."[3] Thus, as between the United States and Mexico in respect of *Avena* (which includes the Medellín matter), the decision of the ICJ is indeed binding.

By ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the U.S. Senate under Article II of the Constitution in 1945, the United States accepted the duty to comply with ICJ judgments in any cases that would come within the ICJ's consensual jurisdiction in the future. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

The jurisdiction of the ICJ in the *Avena* case was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." The Optional Protocol was a treaty in force under Article 36(1) of the ICJ Statute at the time of *Avena*.[4] Proceedings under Article

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2. According to Article 93 of the U.N. Charter, all U.N. Members are *ipso facto* parties to the ICJ Statute.

3. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Serbia-Montenegro), 2007 ICJ No. 91, para. 115.

4. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487. Article I of the Optional Protocol states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

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36(1) produce binding judgments under Article 59 of the Statute, which are "final and without appeal" under Article 60. As the ICJ has recalled,

> it is in the interest of a party that an issue which has already been adjudicated in favour of that party not be argued again. . . . Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.[5]

A litigant's obligation to carry out judgments against it is implicit in the rule of law.

Amici respectfully emphasize the fully consensual nature of the obligations undertaken when the United States agreed by treaty to the Vienna Convention and to the Optional Protocol's system for binding settlement of disputes arising thereunder. The Optional Protocol serves as a forum selection clause, with the effect that parties that have selected the ICJ as the forum to decide their disputes are bound to carry out its decisions.[6] The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses, but once having given consent to a treaty and to a treaty-based dispute settlement system, the United States is bound to comply with the obligations to which it has agreed. Indeed, this Court has long recognized that when the United States undertakes to participate in international dispute settlement, the good faith of the United States is implicated in carrying out the resulting award. *See La*

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On March 7, 2005, the United States gave notice of withdrawal from the Optional Protocol. Under international law, that notice cannot have retroactive effect on the obligation to comply with a judgment entered when the Optional Protocol was fully in force for both parties to the judgment.

5. *Bosnian Genocide*, note 3 *supra*, 2007 ICJ No. 91, para. 116.

6. *Cf. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985).

Abra Silver Mining Co. v. United States, 175 U.S. 423, 463 (1899).

The Texas court misunderstood the nature of an international judgment in treating *Avena* as not binding. A state court is not free to depart from the interpretation and application of an international treaty as authoritatively settled by an international tribunal exercising a consent-based jurisdiction accepted by the federal political branches, nor to place conditions on compliance that are inconsistent with the judgment itself. It was thus error for that court to continue to apply state rules of procedural default in a manner incompatible with *Avena*'s disposition concerning an individual named in the judgment,[7] as well as to deny the efficacy of President Bush's acknowledgment of the obligatory force of the judgment.[8]

The President of the United States accepts that the United States has incurred "international obligations" under *Avena*; *see* President George W. Bush, Memorandum on Compliance with the Decision of the International Court of Justice in *Avena*, Feb. 28, 2005. In its filings in earlier phases of the *Medellín* matter and in other cases, the United States Government has consistently acknowledged that "the United States has an international obligation under Article 94 [of the U.N. Charter] to comply with the *Avena* decision." *See* Brief for the United States as Amicus Curiae Supporting Respondent at 38, *Medellín*

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7. The ICJ concluded that while the procedural default rule in itself does not violate Article 36 of the Vienna Convention, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights. In *Avena*, the treatment of procedural default and related questions comes under the general heading of "Article 36, paragraph 2," beginning at paragraph 107 of the judgment. *See especially* paras. 111-113, 133-134, 138.

8. There is no warrant for the suggestion in the opinion below that a post-judgment executive agreement would be needed as a predicate for carrying out the already existing treaty-based obligation to comply with the judgment.

v. Dretke, 544 U.S. 660 (2005); *see also id.* at 38-39 n. 12 (using term "decision" under Article 59 to refer to "the portion of the ICJ ruling with which the United States has an international obligation to comply – what in United States practice would be called the judgment");[9] Brief for the United States as Amicus Curiae at 18 n. 2, *Ex Parte Medellín* (Ct. Crim. App. TX, Sept. 2, 2005). In its *Sanchez-Llamas* filing, the United States Government likewise confirmed that the United States "is obligated under international law to comply with the judgment of the ICJ in any case to which it is a party." Brief for the United States as Amicus Curiae Supporting Respondents at 29, *Bustillo v. Johnson* and *Sanchez-Llamas v. Oregon*, 548 U.S. __, 126 S. Ct. 2669 (2006). The United States Government also invoked the binding force of the *Avena* judgment in urging the Oklahoma authorities to grant review and reconsideration of the conviction and sentence in the matter of another individual covered by *Avena*, Osbaldo Torres, and those authorities correctly treated the judgment as binding in acting on the Department of State's representations. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Implementation of* Avena *Decision by Oklahoma Court*, 98 AM. J. INT'L L.579, 581-84 (2004); *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (granting remand for evidentiary hearing); *see also* 120 P.3d 1184 (Okla. 2005) (final judicial determination of whether governor's commutation of death sentence overcame any prejudice to defendant from treaty violation).

This Court in *Sanchez-Llamas* made a clear distinction between an ICJ judgment and ICJ treaty interpretations outside the framework of such a judgment, both by drawing attention to the terms of Article 59 of the ICJ Statute (quoting the language on binding force "between the parties and in respect of that particular case," 126 S.Ct at. 2684) and by observing that the

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9. In its recent judgment in the *Bosnian Genocide* case, 2007 ICJ No. 91, para. 123, the ICJ confirmed that the operative part of a judgment possesses the force of *res judicata*.

ICJ's principal purpose is "to arbitrate particular disputes." In declining to give conclusive effects to such interpretations at the behest of persons not covered by the judgment, this Court took note that "the United States has agreed to 'discharge its international obligations' in having state courts give effect to the decision in *Avena*." 126 S. Ct. at 2685.

B. The *Avena* Judgment is Binding Under the Supremacy Clause.

The *Avena* judgment in petitioner's case implements a treaty obligation of the United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all courts in the United States and should be followed as the rule of decision in a state habeas petition.

The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969).[10] The Vienna Convention has been understood at all times to be a self-executing treaty.[11] Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law.[12]

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10. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (before § 464); § 465.

11. The Department of State witness informed the Senate: "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. *See also* RESTATEMENT, Intro. Note before § 464.

12. The priority of treaty law over state law as required by the Supremacy Clause was spelled out explicitly in the State Department's responses to the Senate's questions:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*

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This Court in *Sanchez-Llamas* confirmed the well-established position that "a self-executing treaty binds the States pursuant to the Supremacy Clause" and that

> where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law.

126 S. Ct. at 2680. While the Court there held that the remedy of suppression of evidence was not required by the Vienna Convention, it would be entirely compatible with the approach indicated by this Court in *Sanchez-Llamas* to consider the *Avena* judgment directly binding on state courts. Because *Avena* specified what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petition are properly understood as implementation of self-executing treaty obligations.[13]

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> Answer [after explaining a possible area of conflict not relevant here].
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> To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

13. *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), concerned a situation quite different from the present one. The ICJ's *Nicaragua* judgment (cited in note 19 *infra*) entailed aspects of international law (use of military force) that are non-self-executing in U.S. law. The plaintiffs who sought to enforce the *Nicaragua* judgment were strangers to the ICJ case, *see* 859 F.2d at 938, while *Avena* explicitly deals with petitioner's situation and specifies the remedy for his claims under a

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II. This Court Should Grant The Writ To Uphold U.S. Commitments Under Dispute Settlement Treaties.

It is critical for the United States to uphold the obligatory character of compulsory jurisdiction under dispute settlement clauses to which it has agreed, in order to secure the benefits of compliance by other participants under comparable treaties. The United States was the first state to turn to the ICJ in a Vienna Convention dispute, when it brought an application against Iran concerning U.S. diplomatic and consular personnel held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol when disputes arise to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-152. When the ICJ indicated provisional measures in 1979 and entered judgment in 1980, the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[14] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any

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self-executing treaty. Finally, Congress and the President had repudiated the *Nicaragua* judgment in a subsequent conflicting statute, which the court of appeals found controlling, *see* 859 F.2d at 936-937. Here, no statute rejects *Avena*, and the President has formally endorsed compliance through state courts.

14. *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. With only a few exceptions, all such treaties remain in force for the United States in 2007.

other state:[15] in total, the United States has been party to 21 cases at the ICJ,[16] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[17] Since each of the 70 treaties with an ICJ dispute settlement clause entails obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings.

The United States has a major stake in maintaining a record of abiding by the outcome of ICJ dispute settlement, since it continues to be active in that forum. Compliance with ICJ final judgments has generally been high, including in the cases in which the United States has been a party.[18] States have

15. For a listing of all ICJ cases grouped by state, see the ICJ website at www.icj-cij.org.

16. The United States has also taken part in almost all proceedings for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions*, *in* CROSSROADS at 423; for a current listing, see ICJ Website.

17. The cases initiated by the United States include seven involving Soviet-bloc aerial incidents, as well as *Tehran Hostages* (Iran 1979-81), *Gulf of Maine* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89).

18. Recent studies find compliance with two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period. *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (compliance rate of 60% with judgments issued in last 15 years; likelihood that rate would go up to 80% rate for prior periods in light of efforts to comply over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004) (overall compliance rate of 68%, counting disregard of provisional measures as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, *in* CROSSROADS at 288, 310-319 (only 5 cases of noncompliance with final judgments 1946-1986).

exceptionally disregarded ICJ rulings when they contested the Court's consensual jurisdiction, notably where respondents insisted that the ICJ had been granted no competence to decide a matter involving a state's vital security interests.[19] In the present case, by contrast, jurisdiction was by consent and no security interest would be prejudiced by compliance. Indeed, President Bush's memorandum on compliance with *Avena* confirms the national interest in fulfilling international obligations.

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, both the United States and France promptly complied with the judgment in *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176.[20] In *Gulf of Maine* (Canada/U.S.), 1984 ICJ 246, the final judgment drew a maritime boundary;

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19. See especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14, note 13 above. France denied the existence of proper ICJ jurisdiction in *Nuclear Tests* (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United States and France reacted to these cases by withdrawing from the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

20. The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM. J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco–Criminal Jurisdiction over U.S. Citizens– . . . –International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199, 221 n. 100 (1981) (French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary;" direct application of decision derived from French submission to ICJ jurisdiction).

both sides accepted the judgment and promptly complied with it.[21] In *ELSI*, 1989 ICJ 15, the United States embraced the ICJ forum as the last recourse of its diplomatic efforts and accepted the judgment as dispositive of the claims it had raised on behalf of U.S. investors.[22] Thus, apart from *Nicaragua* (addressed in note 13 above) and such continuing problems as may exist in the wake of *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments addressed to them, except for Iran in the *Tehran Hostages* case.[23]

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21. Compliance having been assumed, only a few cases refer to the ICJ judgment. *See, e.g., Conde v. Starlight I, Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54 (Can. Fed. Ct.), *rev'd*, [1995] 2 F.C. 467, *aff'd*, [1997] 1 S.C.R. 12 (plaintiff sought fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485 (Can. Tax Ct.), paras. 142-147 (ICJ decision became available after arguments concluded).

22. *See* Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 Am. J. Int'l L. 249, 257 (1990).

23. In addition to the cases discussed in the text and *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 466, which resulted in final judgment against the United States after the individuals in question had already been executed, the disposition of the remainder of the 21 cases to which the United States has been party is as follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed for lack of an indispensable party. *Interhandel* (Switz. v. U.S.), 1959 ICJ 16, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugo. v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to

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In view of the U.S. interest in credible fulfillment of dispute settlement undertakings, this Court should ensure that the courts below uphold the U.S. obligations to carry out the final judgment in *Avena*.

III. This Court Should Grant The Writ To Fulfill The U.S. Commitment To Settle A Dispute With Mexico Concerning Treatment Of Mexican Nationals In The United States.

Prior to the Vienna Convention, disagreements over the treatment of U.S. nationals in Mexico and Mexican nationals in the United States – including instances of denial of consular access – frequently led to diplomatic protests and international arbitration.[24] Codification of consular law in the Vienna

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make an *ex gratia* payment. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003 ICJ 152, was discontinued upon an overall settlement. *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 ICJ 426, was discontinued after provisional measures and before the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

24. *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-837 (1942) [HACKWORTH]; 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 626-658 (1970) [WHITEMAN], 8 WHITEMAN at 807-837. In the 1920s, a U.S.-Mexican claims commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given [the] opportunity" of consular access. *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 HACKWORTH 830. Conversely, where California officials did not give the Mexican consulate access to a detained Mexican citizen, the Department of State stressed the importance of California's compliance with standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be

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Convention has produced greater certainty of substantive rules in consular matters,[25] and the creation of a multilateral mechanism for binding settlement of consular disputes in the Optional Protocol obviated the need for a special arbitration agreement between the United States and Mexico to resolve a consular dispute.[26] The United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in

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> permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 HACKWORTH 836.

In the early 20th century, in preparation for arbitration with Mexico involving protection of nationals of one country in the other's territory, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of mirror-image considerations of U.S. federalism. The Department replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 HACKWORTH 593, 597 (1943).

25. Codification of consular law was undertaken by the U.N. International Law Commission and a diplomatic conference. *See* 1961-II Y.B. INT'L L. COMM'N 88-128. The United States played a leading role in negotiating the specific wording of Article 36 of the Convention and the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation].

26. The United States actively advocated the provision that became the Optional Protocol and resisted others' efforts to eliminate or weaken dispute settlement. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States, was an Optional Protocol that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid.*

1969,[27] and Mexico's subsequent acceptance of the same obligation created the necessary consent-based reciprocity for either state to sue the other on any dispute involving interpretation or application of the Convention.

No state can unilaterally determine the definitive meaning of an international treaty.[28] Thus, in a dispute under the Vienna Convention, the United States cannot impose its own view on Mexico (or on any other treaty partner),[29] or establish the measure of its own treaty compliance. Nor can disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach, be determined by the United States as one party to the dispute. For authoritative resolution of such disputes, the Optional Protocol confers jurisdiction on the ICJ.

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27. Withdrawal from the Optional Protocol does not affect the U.S. obligation to abide by the *Avena* judgment. At the same time as the announcement of withdrawal from the Protocol, the United States reaffirmed its commitment to comply with the *Avena* judgment. The State Department spokesman said (in response to a question): "The bottom line is we believe in the international system, we are committed participants in the international system, as reflected by . . . our decision to comply with the judgment." Dep't of State Daily Press Briefing (Mar. 10, 2005), *available at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm.

28. *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (British court decision could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). *See also Mitsubishi*, 473 U.S. at 629; *Bremen*, 407 U.S. at 9 (U.S. courts should not "insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have [international dealings] exclusively on our terms, governed by our laws, and resolved in our courts.").

29. For this reason, U.S. courts ought to give careful consideration to reasoned positions adopted by foreign or international as well as U.S. courts on points of treaty interpretation. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660-661 (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its ruling is required.

The jurisprudence of this Court accepts the authority of the federal government to settle disputes with foreign governments in a manner that binds state courts. In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), this Court found that the federal policy of the United States adopted in the context of definitive resolution of disputes with the Soviet Union would displace contrary state law. In *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that dispute settlement procedures accepted by the U.S. political branches are a traditional and proper method for resolving such grievances. In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court confirmed that an executive policy in favor of achieving "legal peace" with foreign governments had to prevail over a state law affecting the jurisdiction of state courts.[30] Whatever might be the limits of federal authority to resolve disputes with foreign governments in some hypothetical scenario not involved here, it falls clearly within the core of federal power under the Constitution to accept the outcome of a treaty-based dispute resolution process as definitively settling a dispute over treatment of foreign nationals by the states and for this Court to ensure that state courts carry out the treaty-based judgment in question.

Refusal to grant review and reconsideration of petitioner's conviction and sentence as required by the ICJ would compound the treaty violation that occurred when the Texas authorities failed to inform petitioner of his right to communicate with the Mexican consulate. Such a refusal to accord this treaty-based remedy for a treaty violation would prejudice the U.S. ability to

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30. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court invalidated a state law that had embroiled the national government for some time in an international dispute settlement procedure. *A fortiori*, in the face of a binding judgment from treaty-based dispute settlement, a state rule must not impede treaty compliance and a judicial remedy must be available.

insist on compliance by other states with their obligations under the Vienna Convention toward the millions of U.S. nationals who visit or work in Mexico and in the other 164 parties to the Convention.[31]

Ultimately, it is the interpretation of this Court that must have conclusive effect under the Constitution.[32] It would be a justified assertion of the role of this Court, consistent with the principles of federalism and separation of powers, if the Court, as *Amici* urge, exercises its independent judgment to give effect to the legal obligations of the United States embodied in the *Avena* judgment.

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31. On rare occasions of U.S. failure to implement obligations resulting from dispute settlement (as with prolonged noncompliance with the *Chamizal* arbitral award in Mexico's favor), detriments to U.S. economic and political interests are well-documented. *See* SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964 68-69, 75-77, 86-88, 100-101 (1965); ANTONIO GÓMEZ ROBLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (problems in negotiating with Mexico over expropriation of U.S. properties, in view of noncompliance with *Chamizal* award); FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President Kennedy said that because of the U.S. refusal on *Chamizal*, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

At the time of the eventual Chamizal settlement in 1963, the office of the Texas Attorney General concurred with the opinion of the Legal Adviser of the U.S. Department of State that the matter could be resolved with Mexico by treaty without Texas's consent, because of its international implications. *See* LISS at 95-97; 3 WHITEMAN at 680, 696-699.

32. *See* RESTATEMENT, § 112(2) ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States") and comment *a*.

CONCLUSION

Amici urge this Court to ensure that actions and omissions of the State of Texas are remedied by the courts of that State, as the proper organs to bring about compliance with the *Avena* judgment. Refusal to grant the remedy for the Vienna Convention violations that has been determined by the ICJ in its judgment on petitioner's treaty claims would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention. Review and reconsideration of petitioner's conviction and sentence is necessary to avoid the adverse consequences that would result from failure to comply with the *Avena* judgment, which could include prejudice in connection with dispute settlement under other treaties.

By remanding with instructions to afford the remedy of review and reconsideration to redress the violation of the treaty as required by the *Avena* judgment, this Court will fulfill its responsibility within our constitutional system and will sustain compliance with the international obligations of the United States.

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APPENDIX

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Appendix

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Appendix

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No. 06-984

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the President of the United States act within his authority when he determined that the states must comply with the United States's treaty obligation to give effect to the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31, 2004) (No. 128), in the cases of the 51 nationals of Mexico named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

PARTIES

All parties to the proceedings below are named in the caption of the case.

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OPINION BELOW

The decision of the Court of Criminal Appeals of Texas (Pet. App. 1a-79a), has been designated for publication in S.W.3d, but the volume and page numbers are not yet available. It is available at 2006 WL 3302639 and 2006 Tex. Crim. App. LEXIS 2236.

JURISDICTION

The final judgment of the Texas Court of Criminal Appeals, that state's court of last resort in criminal matters, was issued on November 15, 2006. Petitioner filed a timely petition for certiorari on January 16, 2007. This Court granted certiorari on April 30, 2007. This Court has jurisdiction pursuant to Article III, § 2, of the United States Constitution, and 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions (Pet. App. 80a-85a): United States Constitution, art. II, § 1, sentence 1; *id.* § 2, cls. 2-3; *id.* § 3; United States Constitution, art. VI, cl. 2; Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. I, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 325, 596 U.N.T.S. 487 (the "Optional Protocol"); United Nations Charter, art. 94(1), T.S. No. 993, 59 Stat. 1031, 1051 (opened for signature June 26, 1945) (the "UN Charter"); Statute of the International Court of Justice, arts. 36(1), 59-60, T.S. No. 993, 59 Stat. 1031, 1060, 1062-63 (opened for signature June 26, 1945) (the "ICJ Statute"); United Nations Participation Act of 1945, §§ 2(a), 3, *codified as amended at* 22 U.S.C. §§ 287(a), 287a; Rev. Stat. § 2001,

codified as amended at 22 U.S.C. § 1732; Omnibus Diplomatic Security and Antiterrorism Act of 1986, § 103(a)(1)(D), *codified as amended at* 22 U.S.C. § 4802(a)(1)(D); and Texas Code of Criminal Procedure, art. 11.071, § 5(a), (d)-(e).

STATEMENT OF THE CASE

Petitioner José Ernesto Medellín, a national of Mexico who was sentenced to death in Texas in proceedings that violated his right to consular notification under Article 36 of the Vienna Convention on Consular Relations, seeks review and reconsideration of his conviction and sentence in accordance with a binding judgment of the International Court of Justice and a determination by the President of the United States that this country will comply with that judgment.

A. The United Nations Charter and the International Court of Justice

The International Court of Justice is "the principal judicial organ of the United Nations." UN Charter, art. 92. By ratifying the UN Charter—a treaty to which over 190 nations, including the United States and Mexico, have subscribed—a nation "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." *Id.*, art. 94(1) (Pet. App. 81a).

All parties to the UN Charter "are *ipso facto* parties to the Statute of the International Court of Justice," UN Charter, art. 93(1), which forms "an integral part of the Charter," *id.*, art. 92. Under the ICJ Statute, a judgment in a case submitted to the ICJ is "final and without appeal," ICJ Statute, art. 60, but is binding only

"between the parties and in respect of that particular case," *id.*, art 59 (Pet. App. 82a).

The United States proposed the ICJ Statute and led the effort to create the Court. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 865 (1958). The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:

> Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter, . . . it would naturally accept and use an international court to apply international law and to administer justice.

Edward R. Stettinius, Jr., Sec'y of State & Chairman of U.S. Delegation, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference* 137-38 (1945). To date, the United States has brought ten cases to the Court either as an applicant or by special agreement with another state, and in another eleven cases, the United States has been a respondent.[1]

The ICJ's jurisdiction in any particular case depends entirely on the consent of the parties. ICJ Statute, art. 36(1) (Pet. App. 82a). A state may consent generally to the ICJ's jurisdiction on any question arising under a treaty or general international law, *id.*, art. 36(2), or it

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[1] *See* International Court of Justice: Contentious Cases Ordered by Countries Involved, at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&p3=1 (last visited June 27, 2007).

may consent, by a separate treaty or special arrangement, to the ICJ's jurisdiction over a category of cases or a specific dispute, *id.*, art. 36(1). Hence, by ratifying the UN Charter and ICJ Statute, the United States agreed to abide by judgments in any case to which it was a party, but it did not consent to jurisdiction in any particular case.[2]

The Senate approved the UN Charter, along with the attached ICJ Statute, on July 28, 1945, and President Truman signed it on August 8, 1945. In ratifying the UN Charter, the United States made explicit that it was also ratifying the ICJ Statute. *See* Proclamation of Ratification of UN Charter and ICJ Statute, 59 Stat. 1031, 1031 (1945).

B. The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"), provides a comprehensive framework for the work of consular officials. Currently, 171 nations are parties to the Vienna Convention.[3]

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[2] Initially, the United States consented to the general jurisdiction of the ICJ, Declaration by the President of the United States of America August 14, 1946 Respecting Recognition by the United States of America of the Compulsory Jurisdiction of the International Court of Justice, 61 Stat. 1218 (1947), but after commencement of the case in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), it withdrew that consent, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 398 (Jurisdiction and Admissibility Judgment of Nov. 26). It remains party to dozens of agreements conferring jurisdiction on the Court over specific categories of disputes. *See* International Court of Justice, Jurisdiction: Treaties, at http://www.icj-cij.org/jurisdiction/ index.php?p1 =5&p2=1&p3=4 (last visited June 27, 2007); U.S. Dept' of State, Treaties in Force 2006: Multilateral Treaties and Other Agreements, at http://www.state.gov/s/l/treaty/treaties/2006/83254.htm (last visited June 27, 2007).

[3] *See* Multilateral Treaties Deposited with the Secretary-General: Vienna Convention on Consular Relations, at http://untreaty.un.org/

Among other things, Article 36 of the Vienna Convention requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." The rights afforded by Article 36 are critical to United States consular officers' efforts to protect American citizens living, working, and traveling abroad. *See* Br. for U.S. as Amicus Curiae Supporting Resp't at 43, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Br. for U.S. as Amicus Curiae on Pet. for Cert. at 12. While the United States has vigorously insisted on strict compliance with Article 36 when Americans have been detained overseas, compliance in the United States has been poor. *See, e.g., Medellín v. Dretke*, 544 U.S. at 674 (O'Connor, J., dissenting) (noting "vexing problem" of "individual States' (often confessed) noncompliance" with Article 36).

The Optional Protocol to the Vienna Convention provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I. It constitutes a specific consent to jurisdiction under Article 36(1) of the ICJ Statute. Of the 171 nations that have ratified the Vienna Convention, 46 have also ratified the Optional Protocol.[4]

ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp (last visited June 26, 2007).

[4] *See* Multilateral Treaties Deposited with the Secretary-General: Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp (last visited June 26, 2007). On March 7, 2005, the United States gave notice that it intended to withdraw from the

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See* Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. Doc. E, 91st Cong., at 59-61 (1st Sess. 1969). Among other things, the United States proposed the binding dispute settlement provisions that became the Optional Protocol and successfully led the resistance to efforts by other States to weaken or eliminate altogether those provisions. *See id.* at 72-73.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously approved the instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969).

C. Mr. Medellín's Conviction, Sentence, and Initial Collateral Proceedings

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellín, a Mexican national, told the arresting officers that he was born in Mexico and informed Harris County Pretrial Services that he was not a United States citizen. Nevertheless, Mr. Medellín was not advised of his Article 36 right to seek assistance from the Mexican consul, nor was the Mexican consulate ever notified of his detention. Mr. Medellín was unaware

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Optional Protocol. *See* U.S. Dep't of State, Daily Press Briefing, Mar. 10, 2005, available at http://www.state.gov/r/pa/prs/dpb/2005/43225.htm (last visited June 27, 2007).

of his right to seek consular assistance at any time either before or during his capital trial.[5]

On September 16, 1994, Mr. Medellín was convicted of capital murder and, on October 11, 1994, sentenced to death. On March 16, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellín's conviction and sentence in an unpublished order.

On April 29, 1997, Mexican consular authorities first learned of Mr. Medellín's detention when he wrote to them from death row, and they promptly began rendering him assistance. On March 26, 1998, Mr. Medellín filed a state application for a writ of habeas corpus arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. The trial court denied relief and, by unpublished order dated September 7, 2001, the Texas Court of Criminal Appeals again affirmed.

On November 28, 2001, Mr. Medellín filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellín again raised, among others, an Article 36 claim. On June 26, 2003, the District Court denied his petition.

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[5] At the time Mr. Medellín was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and most importantly, ensuring that Mexican nationals were represented by competent and experienced defense counsel. *See* Memorial of Mexico at 11-38, *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (No. 128); *see also Valdez v. State*, 2002 OK CR 20, ¶25, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national).

D. The *Avena* Case in the International Court of Justice

In early 2003, Mexico initiated proceedings against the United States in the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, seeking a remedy for violations of the Vienna Convention rights of individual Mexican nationals who were then under sentence of death in the United States. Mexico invoked the United States's consent to jurisdiction in the Optional Protocol.

The United States fully participated in the *Avena* proceedings. After extensive briefing and a week-long hearing, the ICJ rendered a judgment that expressly adjudicated Mr. Medellín's own rights and those of the 51 other Mexican nationals. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (Pet. App. 86a-186a). Specifically, the ICJ held that the United States had breached Article 36(1)(b) of the Vienna Convention in the cases of 51 of the Mexican nationals, including Mr. Medellín, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena*, ¶¶ 106(1)-(2), 153(4) (Pet. App. 155a-156a, 183a). The ICJ held further that in 49 of those cases, including that of Mr. Medellín, the United States had also violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals." *Id.*, ¶¶ 106(3), 153(5)-(6) (Pet. App. 156a, 183a-184a). Finally, the ICJ held that in 34 cases, again including that of Mr. Medellín, the United States had also violated its obligation under Article 36(1)(c) "to enable Mexican consular officers to arrange for legal

representation of their nationals." *Id.*, ¶¶ 106(4), 153(4), 153(7) (Pet. App. 156a, 183a, 184a).

As to remedies, the ICJ first denied Mexico's request for annulment of the convictions and sentences. *Id.*, ¶ 123 (Pet. App. 166a). However, recognizing that Article 36(2) of the Convention requires the laws of the signatory states to give "full effect" to the purposes of the rights accorded by Article 36, the ICJ held that United States courts must provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals as a remedy for the violations of Article 36(1) in their cases. *Id.*, ¶¶ 121-22, 153(9) (Pet. App. 165a, 185a). The ICJ specified that, *first*, the required review and reconsideration must take place as part of the "judicial process;" *second*, procedural default doctrines could not bar the required review and reconsideration; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration would occur must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, ¶¶ 113-14, 122, 134, 138-39, 140 (Pet. App. 160a-161a, 165a, 170a-171a, 173a-174a).

E. Proceedings in the Fifth Circuit and This Court

The *Avena* judgment was handed down while Mr. Medellín's application for a certificate of appealability from the denial of federal habeas relief was pending before the Fifth Circuit. Although the effect of the *Avena* judgment had not been briefed or argued, the Fifth Circuit considered the judgment before following prior Fifth Circuit precedent holding that Article 36 of the Vienna Convention was not judicially enforceable.

Medellín v. Dretke, 371 F.3d 270 (5th Cir. 2004). Mr. Medellín petitioned for certiorari on the question of the effect in courts in the United States of the adjudication of his own rights in *Avena*, and this Court granted.

F. The President's Determination

On February 28, 2005, after Mr. Medellín had submitted his opening brief in this Court, President George W. Bush issued a signed, written determination that state courts must provide the required review and reconsideration to the 51 Mexican nationals named in the *Avena* judgment, including Mr. Medellín, notwithstanding any state procedural rules that might otherwise bar review of their claims. The President declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Pet. App. 187a.

The President's determination was attached as an exhibit to the United States's brief as *amicus curiae* which was filed the same day in Mr. Medellín's case. Br. for U.S. as Amicus Curiae Supporting Resp't at 8a, *Medellín v. Dretke*. In that brief, the United States explained that the President had determined that the United States had a "paramount interest . . . in prompt compliance" with the *Avena* judgment. *Id.* at 41. Specifically, the President had determined that compliance would "serve[ ] to protect the interests of United States citizens abroad, promote[ ] the effective conduct of for-

eign relations, and underscore[] the United States's commitment in the international community to the rule of law." *Id.* at 9. The United States stressed that "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected." *Id.* at 41.

The United States explained that pursuant to the President's determination, an individual Mexican national named in the judgment "may file a petition in state court seeking [the] review and reconsideration [ordered in *Avena*], and the state courts are to recognize the *Avena* decision." *Id.* at 42. In such a case, "a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention." *Id.* at 46. Finally, state procedural rules that might otherwise prevent a state court from giving effect to the *Avena* judgment "must give way." *Id.* at 43.

G. This Court's Dismissal of Certiorari

In deference to the President's determination directing claims for review and reconsideration to the state courts, Mr. Medellín filed a motion to stay his case in this Court, requesting that the case be held in abeyance while Mr. Medellín exhausted in state court his claims based on *Avena* and the President's determination—neither of which existed at the time of his first state post-conviction petition. In order to ensure compliance with any applicable statute of limitations, Mr. Medellín filed the contemplated petition for a writ of habeas corpus in the Texas Court of Criminal Appeals while his case was pending before this Court, and he asked the Texas court to hold his petition in abeyance until this Court ruled on his motion for a stay.

On May 23, 2005, this Court dismissed the writ of certiorari as improvidently granted, "[i]n light of the possibility that the Texas courts [would] provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President's memorandum." *Medellín v. Dretke*, 544 U.S. 660 (2005) (*per curiam*). The Court noted that it could later review the questions presented, "unencumbered by the issues that arise from the procedural posture" of a federal habeas case, following the resolution of Mr. Medellín's subsequent state habeas action. *Id.* at 664 n.1; *see also id.* at 669 (Ginsburg, J., concurring); *id.* at 694 (Breyer, J., dissenting).

H. The Proceedings Below

Following this Court's dismissal, the Texas Court of Criminal Appeals set Mr. Medellín's habeas petition for briefing and oral argument on whether it satisfied the requirements of Article 11.071, § 5, of the Texas Code of Criminal Procedure ("Section 5"). *Ex parte Medellín*, 206 S.W.3d 584 (Tex. Crim. App. 2005) (order directing briefing). Section 5 is the Texas provision governing subsequent applications by petitioners who have previously sought post-conviction relief.

In both his petition and his brief, Mr. Medellín argued that the *Avena* judgment and the President's determination to comply with it constituted binding federal law that, by virtue of the Supremacy Clause of the United States Constitution, preempted any inconsistent provisions of Texas law, including Section 5. Mr. Medellín also argued that, in any case, he satisfied the requirements of Texas law. As *amicus curiae*, the United States urged the Texas court to grant Mr. Medellín the review and reconsideration he sought, on the ground that President's determination constituted preemptive federal law. Br. for U.S. as Amicus Curiae at 49-50, *Ex parte Medel-*

lín, No. AP-75,207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006).

On September 14, 2005, the Court of Criminal Appeals heard oral argument from Mr. Medellín, the State of Texas, and the United States. On November 15, 2006, that Court dismissed Mr. Medellín's application, holding that he did not satisfy Section 5 and that neither *Avena* nor the President's determination preempted that provision. Pet. App. 1a-79a.

With respect to the *Avena* judgment, Judge Keasler wrote on behalf of a majority to hold that Mr. Medellín's claim was foreclosed by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), which, the Texas court observed, had interpreted the Vienna Convention in a manner inconsistent with the *Avena* judgment. Pet. App. 20a. "In this case," the court concluded, "we are bound by the Supreme Court's determination that ICJ decisions are not binding on United States courts." *Id.* at 24a. The Texas court did not address the question of whether the *Avena* judgment, as Mr. Medellín had argued, would still be binding in the cases of individuals like him whose rights had been expressly adjudicated by the ICJ (unlike the petitioners in *Sanchez-Llamas*) regardless of whether United States courts would reach the same interpretation.[6]

With respect to the President's determination, the Texas court was divided, with no single rationale commanding a majority. Judge Keasler, joined by Judges Meyers, Price, and Hervey, found that the President had "exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with

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[6] *See* Subsequent Application for Post-Conviction Writ of Habeas Corpus, at 20-23, *Ex parte Medellín*; Br. of Applicant at 36, 41-43, 51, *Ex parte Medellín*.

Avena." *Id.* at 45a. Specifically, Judge Keasler concluded that "the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary." The President, she continued, "cannot dictate to the judiciary what law to apply or how to interpret the applicable law." *Id.* at 30a.

Judge Keasler then considered the President's foreign affairs authority under Article II. While acknowledging the President's authority to "settle international controversies[,] comply with treaty obligations[, and] negotiate and enter into an executive agreement to settle a dispute with a foreign nation," she reasoned that because the President's determination was not supported by an executive agreement with Mexico, he had exceeded that authority. *Id.* at 45a-47a. She also held insufficient to justify the President's determination his duty under Article II, § 3, faithfully to execute the laws, his statutory duty to protect American citizens abroad, and his statutory authorization to represent the United States before the United Nations. *Id.* at 47a-55a.

Presiding Judge Keller delivered an opinion concurring in the judgment, stating that the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution," *id.* at 71a, and suggesting that, at a minimum, a new treaty would be required to give effect to the *Avena* judgment, *id.* at 68a-69a. Judge Cochran, writing for herself and Judges Johnson and Holcomb, found that the President's determination was without effect because it was not written in a "manner prescribed for Presidential Proclamations or Executive Orders," but rather appeared to be "written in a private memo style." *Id.* at 78a-79a. Judge Womack concurred in the result without opinion. *Id.* at 64a.

Having found that neither the President's determination nor the *Avena* judgment constitutes binding federal law, the Court of Criminal Appeals concluded that it could not preempt Texas's Section 5. The court then went on to interpret that provision to bar Mr. Medellín's application on grounds of procedural default, and on that basis, dismissed it. Pet. App. 63a-64a.[7]

Mr. Medellín petitioned for certiorari, and on April 30, 2007, this Court granted. *Medellín v. Texas*, 127 S. Ct. 2129 (2007).

SUMMARY OF ARGUMENT

The President of the United States has acted to give effect to the Nation's obligation, under duly ratified treaties, to abide by the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment. In making that determination, the President entered into no new international agreements, prescribed no new rules, established no new procedures, and undertook no new obligations. Instead, he merely confirmed that the United States would comply with international commitments already made by the constitutionally designated political actors, and would do so through the post-conviction review procedures already provided by state law. No more modest exercise of his foreign affairs authority, nor any with clearer authorization from the appropriate

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[7] Following the Texas court's decision, in order to ensure that his rights were preserved under any applicable statute of limitations, Mr. Medellín filed a habeas corpus petition in the United States District Court for the Southern District of Texas. *See Lawrence v. Florida*, 127 S. Ct. 1079 (2007) (filing of certiorari petition to review state-court decision does not toll time limit for federal habeas). At the same time, Mr. Medellín applied for a stay pending disposition of this case, which the District Court granted. *Medellín v. Quarterman*, No. 4:06cv3688 (S.D. Tex. May 25, 2007) (order).

political branches, can be imagined. The Texas Court of Criminal Appeals, in suggesting that the President had stepped over the bounds of executive authority and into the realm of lawmaking, misunderstood the nature of the President's determination and the scope of federal foreign affairs authority, as well as the extent of its own obligation to give effect to treaty obligations as federal law.

The United States agreed to comply with the ICJ's decisions, in cases to which the United States was a party, by three treaties ratified by the President with the advice and consent of the Senate: the United Nations Charter, the Statute of the International Court of Justice, and the Optional Protocol to the Vienna Convention on Consular Relations. None of the parties with a direct interest in this case—the United States, Texas, Mexico and Mr. Medellín—disputes that the United States has an international treaty obligation to give effect to the *Avena* judgment in the cases of the 51 individual Mexican nationals whose cases the ICJ adjudicated in *Avena*. Although this Court has held that the ICJ's reasoning has no binding *precedential* effect in future cases, it is undisputed that, by treaty, its judgments are binding in the particular cases they resolve. The Supremacy Clause in Article VI of the United States Constitution incorporates this undisputed treaty obligation into our domestic law by making treaties the "supreme Law of the Land" on a par with acts of Congress.

The Supremacy Clause, together with Article III, also makes explicit that state and federal courts are to enforce treaties as law in cases within their respective jurisdictions. Thus, this Court has consistently held that where a treaty provides a rule by which the rights of the litigants may be determined, courts must resort to the treaty for the rule of decision in the same manner as they

would resort to an act of Congress. The review and reconsideration ordered by *Avena* is just such a rule, as it is susceptible of enforcement only by judicial processes.

In addition, the Constitution places with the President the authority to "take Care that the Laws be faithfully executed." Both historical practice and this Court's decisions make clear that this authority affords the President discretion to determine the means of enforcement of statutes and treaties to the extent not specified by Congress or the treaty, and to take such other steps as may be necessary to ensure that the powers that the Constitution gives to the federal government can be carried into effect. Here, the President has confirmed that the *Avena* judgment must be given effect in state courts. He has thereby eliminated any possible objection that further federal action might be necessary before the *Avena* judgment would become enforceable in the domestic courts, as well as any possible concern that state courts' compliance with their obligation to enforce treaties might interfere with federal conduct of the Nation's foreign affairs.

The Constitution also confers on the President independent authority to formulate and execute the Nation's foreign policy. That authority is at its zenith where the President acts in accordance with an act of Congress—or, as here, with a treaty ratified with supermajority consent of the Senate, which by the Constitution is federal law on a par with an act of Congress. Exercising his foreign affairs authority, the President has determined that "expeditious compliance" with the *Avena* judgment is in the "paramount interest" of the United States. As the United States has explained, by ordering compliance, the President pursued two critical objectives: the need for the United States to resolve a dispute with a foreign gov-

ernment and fulfill its international obligations, and the need to preserve the United States's ability to protect Americans abroad.

The President's determination constitutes a quintessential foreign policy judgment that lies at the core of his foreign relations authority. The President has done nothing more than determine that the United States will do what the elected representatives of the American people, by the treatymaking processes prescribed by the Constitution, have already promised: to abide by a judgment of the ICJ in a case to which the United States was a party. Congress also has confirmed by statute the power of the President to act in this sphere. But in any event, this Court has repeatedly recognized that the President has authority to resolve disputes with foreign powers even without the participation of the Senate or an act of Congress. The authority exercised here, to give effect to the result of a dispute resolution mechanism established by duly ratified treaty, is far more modest.

The decision of the Texas Court of Criminal Appeals rested on its assumption that an "executive agreement" was needed to preempt state law. This misses the point entirely. The international agreement that the Texas court believed was necessary already exists, in the ratified treaties that obligate the United States to abide by judgments of the ICJ in cases to wnich it was a party. The conclusion of an additional executive agreement would not perform any useful function: Mexico has made clear that it seeks compliance with the *Avena* judgment, and the United States has made clear that it intends to comply.

The treaty obligation to abide by the *Avena* judgment and the President's determination that the United States will do so preempt any contrary state law. The *Avena* judgment entitles Mr. Medellín to review and reconsideration, which must fully examine the violation of his

consular notification rights and its effect on his conviction and sentence. Invoking a Texas procedural default statute, the Texas court denied him the required review and reconsideration. Because, in the circumstances of this case, application of this provision of state law directly conflicts with the President's exercise of his constitutional authority and with the treaty obligation to comply with the *Avena* judgment, the Texas court erred on a matter of federal law.

This Court should ensure that the United States keeps faith with its treaty partners by holding that Mr. Medellín is entitled to the review and reconsideration that the ICJ ordered.

ARGUMENT

I. As a Matter of Both International Law and United States Law, the *Avena* Judgment Is Binding.

A. The United States Is Bound by Treaty to Comply with the *Avena* Judgment.

When it ratified the United Nations Charter, the United States "undert[ook] to comply with the decision of the International Court of Justice in any case to which it is a party." UN Charter, art. 94(1). At the same time, by ratifying the ICJ Statute, the United States agreed that a decision of the ICJ in a case to which the United States was a party would have "binding force . . . between the parties and in respect of that particular case" and be "final and without appeal." ICJ Statute, arts. 59-60. Even without the treaty commitment reflected in the UN Charter and ICJ Statute, the United States would still have a treaty obligation to comply with any judgment rendered by the ICJ by virtue of the

jurisdiction conferred by the Optional Protocol, as an agreement between two nations to submit a dispute to an international body for decision implies an agreement to abide by the result. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899).

When a nation enters into a treaty, it undertakes an international obligation that binds all of its organs (executive, legislative and judicial) and all its constituent jurisdictions (state and federal). *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 cmt. b (1987). Hence, by binding itself to comply with a judgment of the ICJ in a case to which it was a party, the United States bound all the states, including Texas, and all its judicial organs, including the Texas courts.

"[A] treaty is only another name for a bargain." THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961). Consistent with the basic legal principles underlying all contracts, the parties' consent invests the treaty with binding force. RESTATEMENT, *supra*, § 312(1). Making decisions about their own interests, nations accept binding treaty obligations so that they may obtain reciprocal rights or other valuable commitments from their treaty partners. *See, e.g.*, THE FEDERALIST NO. 64, *supra*, at 394 ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.") (emphasis in original). Thus, the obligation to perform treaty obligations—the rule of *pacta sunt servanda*—"lies at the core of the law of international agreements and is perhaps the most important principle of international law." RESTATEMENT, *supra*, § 321 cmt. a.

At the time of the filing of *Avena* and the rendering of the judgment, the United States was a party to the

Optional Protocol.[8] Hence, by virtue of that Protocol, the UN Charter, and the ICJ Statute, it was under an obligation to comply with that judgment. None of the parties with a direct interest in this case—the United States, Texas, Mexico, and Mr. Medellín—disputes that obligation.[9]

The Texas court's apparent conclusion that in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), this Court directed courts in the United States to breach that obligation is plainly mistaken. In *Sanchez-Llamas*, the issue of whether Article 36 of the Vienna Convention preempts procedural default rules was raised by Mario Bustillo, a national of Honduras, whose case was not before the ICJ in *Avena*. *See Sanchez-Llamas*, 126 S. Ct. at 2676, 2682-87. The other petitioner, Moises Sanchez-Llamas, though a Mexican national, was not one of the 51 expressly named in the *Avena* judgment. This Court observed that "[t]he ICJ's decisions have '*no binding force* except between the parties and in respect of that particular case.' " *Id.* at 2684 (quoting ICJ Statute, art. 59) (emphasis in original). The Court concluded that since the ICJ's interpretations are "not binding precedent

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[8] In withdrawing from the Optional Protocol, the United States made clear that it continues to be bound by the Vienna Convention itself and that its withdrawal from the Optional Protocol would apply only to future cases and have no effect on this case or the obligation to comply with the *Avena* judgment. *See* U.S. Dep't. of State, Daily Press Briefing, Mar. 10, 2005, available at http://www.state.gov/r/pa/prs/dpb/2005/43225.htm (last visited June 27, 2007).

[9] *See, e.g.*, Br. for U.S. as Amicus Curiae at 21, *Ex parte Medellín* (acknowledging international obligation to comply with *Avena* decision); Br. Amicus Curiae of United Mexican States in Supp. of Medellín at 28-29, *Ex parte Medellín* (calling on United States to comply with obligation to abide by *Avena* decision); Respondent's Br. at 34, *Medellín v. Dretke* (acknowledging "obligation to respect the ICJ's judgments").

even as to the ICJ itself," they are not binding precedent in courts of the United States. *Id.* Accordingly, the Court proceeded to interpret Article 36 of the Vienna Convention itself, giving "only . . . 'respectful consideration' " but not binding precedential effect to the ICJ's interpretation. *Id.* at 2685.

Here, by contrast, the issue is not the effect of the ICJ's *interpretation* as a *precedent*, but the effect of the ICJ's *decision* as a *judgment*. Unlike the petitioners in *Sanchez-Llamas*, Mr. Medellín is a national of Mexico whose case was specifically adjudicated in *Avena*, and the United States is undisputedly bound "in respect of [his] particular case." ICJ Statute, art. 59. Thus, the interpretation of Article 36 of the Vienna Convention—regarding which the ICJ and this Court came to differing conclusions—is simply not an issue in this case. Instead, the issue is the enforceability of a valid final judgment that is binding on the United States by treaty. Indeed, the United States takes the position that the *Avena* judgment must be enforced in this case even while disagreeing with its interpretation of the Vienna Convention. *See, e.g.*, Br. for U.S. as Amicus Curiae on Pet. for Cert. at 12.[10]

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[10] Similarly, in *Breard v. Greene*, 523 U.S. 371 (1998), this Court did not address the effect of an ICJ judgment. At the time of the *Breard* decision, the ICJ had not adjudicated the merits of Mr. Breard's claim, but had only indicated provisional measures that the United States stay Mr. Breard's execution until the ICJ could consider his case. The United States urged the Court to deny relief in *Breard*, arguing that, by its terms, the order was not mandatory, and advising the Court that in any event, under the terms of the UN Charter and ICJ Statute, indications of provisional measures by the ICJ were not binding. *See* Brief for U.S. as Amicus Curiae, at 49-50, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-1390). Thus, this Court proceeded to address not the effect of an ICJ judgment, but only whether the Vienna Convention itself required relief as an original matter. *See Breard*, 523 U.S. at 375-76; *see also Sanchez-Llamas*, 126 S. Ct. at

B. Texas Is Bound by the United States Constitution to Comply with the *Avena* Judgment.

To enable the United States to negotiate treaties with foreign powers as a single nation, the Constitution places the treatymaking power squarely in the hands of the federal government by including it among the Article II powers of the executive branch. U.S. CONST. art. II, § 2, cl. 2. The Constitution makes this power exclusive to the federal government by expressly withdrawing from the states the power independently to make treaties or otherwise conduct foreign affairs. U.S. CONST. art. I, § 10.

The Constitution also places the treatymaking power squarely in the hands of the political branches by providing that the President "shall have Power, with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. The requirement of senatorial consent by supermajority vote ensures that the United States will enter into treaties only with the strong support of the elected representatives of the American people.

Once a treaty is ratified in accordance with the Constitution, the Supremacy Clause gives it the status of supreme federal law, preempting the laws of the individual States in the same manner as acts of Congress and the Constitution itself:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made*, under the

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2667. Here, by contrast, the ICJ has issued a final decision in the case of Mr. Medellín and the other Mexican nationals covered by the *Avena* judgment, and the United States has recognized that that judgment is binding in the particular cases that it adjudicated.

> Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added). In other words, the Constitution makes explicit that treaties bind the Nation as a whole and are not left to the possibly inconsistent policies of the individual states. "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (opinion of Chase, J.).

The inclusion of treaties within the Supremacy Clause addressed a serious problem under the Articles of Confederation. In the early years of its independence, the United States had concluded treaties with France and Great Britain granting certain privileges and immunities—both civil and criminal—to nationals or former nationals of those nations. For example, the 1783 peace treaty with Great Britain prohibited prosecutions and confiscations of property on grounds of having aided Britain during the Revolutionary War, and required the release of individuals then being detained on such charges. *See* Treaty of Peace, U.S.-Gr. Br., art. 6, Sept. 3, 1783, 12 Bevans 8.

State legislatures adopted laws contrary to the treaties, however, and with limited exceptions, local officials and judges applied those state laws in disregard of the United States's treaty obligations.[11] As a result, foreign

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[11] *See generally* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1102-33 (2000). *See also, e.g.*, THE FEDERALIST NO. 22, *supra*, at 183 ("The treaties of the United States under the present [Articles of Confederation] are liable to the infractions of thirteen different legislatures, and as many dif-

powers began to doubt the wisdom of concluding further treaties with the United States, and fears arose that the states' noncompliance with the Nation's treaty obligations would lead foreign powers to resort to war against the United States.[12] As Alexander Hamilton remarked:

> The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

THE FEDERALIST NO. 22, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[13]

By making treaties part of the "supreme Law of the Land," binding on all constituent organs and political subdivisions of the United States, the Framers ensured that the legal effect of treaties under United States law would correspond to their legal effect under international

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ferent courts of final jurisdiction, acting under the authority of those legislatures."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand ed., rev. ed. 1966) ("The tendency of the States to . . . violations [of the law of nations and of treaties] has been manifested in sundry instances.").

[12] *See, e.g.*, Golove, *supra* note 11, at 1116, 1128-29.

[13] *See, also, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 11, at 316 (James Madison) ("A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole."); *cf. Chy Lung v. Freeman*, 92 U.S. 275, 278-80 (1876) (if California "should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?").

law. They thereby ensured that the United States, as a single nation, would be able to act effectively in international affairs.

II. State Courts Have a Constitutional Obligation to Apply the *Avena* Judgment, and the President Properly Took Action to Ensure That They Faithfully Execute That Obligation.

A. The Constitution Requires State Courts to Enforce Treaties As Federal Law.

By the Supremacy Clause, the Framers did not simply make "all Treaties made, or which shall be made, under the Authority of the United States," a species of supreme federal law. U.S. CONST. art. VI, cl. 2. They also expressly commanded that "the Judges in every State shall be bound" by that species of federal law, "any Thing in the Constitution or laws of any State to the Contrary notwithstanding," just as they are bound by "[t]his Constitution, and the Laws of the United States" enacted by Congress. *Id.* By parallel language in Article III, the Framers placed cases arising under treaties within the federal judicial power: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority." U.S. CONST. art. III, § 2, cl. 1. They thereby made explicit the obligation of judges in the United States, both state and federal, to ensure compliance with the United States's treaty obligations.

The Framers considered judicial enforcement of treaties essential to the maintenance of our international commitments. As James Wilson stated in the course of the Pennsylvania debates over ratification of the Constitution,

> the provision for judicial power over cases arising under treaties, sir, will show the world that we make

> the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot 2d ed. 1881). Alexander Hamilton also underscored the importance of the courts, and in particular of this Court, in enforcing treaties:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, *supra*, at 150.

Consistent with the constitutional design, this Court has long held that a ratified treaty

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598-99 (1884) (emphasis added). *See United States v. Rauscher*, 119 U.S. 407, 417-19 (1886) (explaining *Head Money* and other precedents). Here, the treaty requirement at issue—to provide review and reconsideration in a judicial process meeting the criteria laid down in *Avena*—is, by definition, a rule establishing rights "of a nature to be enforced in a court of justice."

Head Money, 112 U.S. at 599. Indeed, a court of justice is the *only* place the right could be enforced. Thus, the result in this case follows inexorably from the long and uninterrupted line of cases in which this Court has made clear, in civil and criminal cases alike, that courts must in individual cases apply, as the "rule of decision," *Head Money*, 112 U.S. at 599, treaties duly ratified by the President with the advice and consent of the Senate, even if those treaties conflict with state law in areas of traditional state concern.[14]

In short, once the United States ratified the Optional Protocol, the UN Charter, and the ICJ Statute, "the Judges [of Texas were] bound thereby, any Thing in the Constitution or Laws of [that] State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. That command, without more, would require the Texas court to afford review and reconsideration on an application by a Mexican national afforded that relief by the *Avena* judgment.

B. The President Has the Power and Duty to Take Care That the United States's Treaty Obligations Are Faithfully Executed.

Article II of the Constitution provides that the President "shall take Care that the Laws be faithfully exe-

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[14] *See, e.g., El Al Israel Airlines v. Tseng*, 525 U.S. 155, 175-76 (1999) (state law preempted as to personal injury liability); *Kolovrat v. Oregon*, 366 U.S. 187, 196-97 (1961) (state law preempted as to property ownership); *Asakura v. Seattle*, 265 U.S. 332, 343 (1924) (state law preempted as to local business regulation); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832) (state law preempted as to criminal prosecution); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813) (state law preempted as to property forfeiture); *see also Wildenhus's Case*, 120 U.S. 1, 17 (1887) (treaty ousting state courts of jurisdiction over crime within state's borders would be enforceable in federal court by habeas corpus).

cuted." U.S. CONST. art. II, § 3. It has long been recognized that the "Laws" to which this section refers include treaties of the United States. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *In re Neagle*, 135 U.S. 1, 63-64 (1890). And as this Court has made clear, the President's power and duty under this clause is not "limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms," but also includes authority to take such steps as he concludes are necessary to carry into effect "the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution." *Neagle*, 135 U.S. at 64.

To ensure that treaty obligations are faithfully executed, the President may bring suit against a political subdivision of the United States, and he needs no statutory authorization to do so. *See Sanitary Dist. v. United States*, 266 U.S. 405, 425-26 (1925) (federal Executive did not require congressional authorization to sue state agency to enforce treaty); *Mexican Boundary—Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250 (1907) (federal Executive could sue private corporation to enforce judgment of international commission that was binding by treaty); *see also, e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960) (federal Executive could sue to enforce federal law even beyond specific remedies established by statute). The President may also take other steps that he deems appropriate to enforce federal laws without specific Congressional authorization. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958) (dispatch of federal troops); *Neagle*, 135 U.S. at 63-68 (dispatch of federal marshal).

Where neither the treaty itself nor a federal statute prescribes the means by which a treaty is to be imple-

mented, the President's authority under the Take Care Clause includes the power to choose the means of enforcement. For example, the Jay Treaty of 1794 provided for the extradition of fugitives to Great Britain, but neither the treaty nor a statute specified the procedure to be followed. *See* Treaty of Amity, Commerce and Navigation, U.S.-Gr. Br., art. 27, Nov. 19, 1794, 8 Stat. 116, 129. Under the authority of the treaty, President John Adams issued a warrant for the arrest and extradition to Great Britain of an individual accused of murder on the high seas. Expressing views that this Court has endorsed as "masterly and conclusive," *Fong Yue Ting*, 149 U.S. at 714, then-Representative John Marshall explained why, in the absence of specification by Congress of the means of implementation, this action was within the President's authority:

> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. . . . Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the [treaty]; but, till this be done, it seems the duty of the executive department to execute the [treaty] by any means it possesses.

Speech of John Marshall, 10 ANNALS OF CONG. 596, 613-14 (1800), *reprinted in* 18 U.S. (5 Wheat.) app. 3, 27; *accord United States v. Cooper*, 25 F. Cas. 631, 642 (C.C.D. Pa. 1800) (Chase, J., on circuit) (Jay Treaty was "the law of the land," and President had authority to execute its extradition provision). Moreover, the President

has long exercised the responsibility "to defend and protect and provide procedure for enforcing the rights that are given to aliens under treaties made by the Government of the United States." Remarks of President Taft to Members of Am. Soc'y of Int'l Law (Apr. 29, 1910), 18 William H. Taft papers, series 9A, at 206 (Library of Congress microfilm).

Here, the President has directed that "the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision" in the case of Mr. Medellín and others similarly situated. Pet. App. 187a. As he has explained, this means that "in order to obtain 'review and reconsideration' of their convictions and sentences in light of the decision of the ICJ in Avena, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision." Br. for U.S. as Amicus Curiae Supporting Resp't at 42, *Medellín v. Dretke*.

The President's choice of the means by which the United States would discharge its obligations under the *Avena* judgment falls squarely within his authority to take care that the United States's treaty obligations are faithfully executed. *First*, the President's choice of means fully comports with the treaty right at issue. A treaty requirement, just like a constitutional or statutory requirement, may call for legislative, executive, or judicial action. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (quoting 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed. 1984)). The "review and reconsideration" of convictions and sentences in accordance with the standards adopted in the *Avena* judgment is a quintessentially judicial function that the state courts are well equipped to carry out. *See Avena*, ¶¶ 140-143 (Pet. App. 174a-176a); *see also* Br. for U.S.

as Amicus Curiae Supporting Resp't at 41, *Medellín v. Dretke* (noting "the suitability of judicial review as a means of compliance").

Second, the President's choice of means utilizes state procedures already available. Every state, including Texas, provides judicial procedures for post-conviction review of convictions and sentences. *See, e.g.*, Tex. Code Crim. Proc. art. 11.071. The President's determination allows the Mexican nationals whose rights were adjudicated in *Avena* to use those existing procedures to obtain the required review and reconsideration, and directs the state courts to give preemptive effect in those cases to the *Avena* judgment as required by treaty. *See Testa v. Katt*, 330 U.S. 386 (1947).

Third, the President's choice of means shows "proper respect for state functions" by allowing federal questions concerning the state criminal process to be heard in the first instance in state courts. *Younger v. Harris*, 401 U.S. 37, 44 (1971) (federal courts should not hear challenges to pending state-court criminal prosecutions when those challenges can be resolved in state court). Indeed, federal law requires the exhaustion of state remedies before the federal courts can grant habeas corpus, *see* 28 U.S.C. § 2254(b)(1)(A), and there may be federal law obstacles to federal habeas review of state court application of federal law that do not apply in the state court itself, *see Medellín v. Dretke*, 544 U.S. at 664-66. These requirements are premised, however, on the obligation of state courts faithfully to *apply* federal law, not on any option to *disregard* it.

Finally, by directing state courts to recognize *Avena* on petitions seeking the review and reconsideration ordered by *Avena*, the President did not make law, as the Texas plurality erroneously suggested. Pet. App. 48a. He did not purport to interpret the Vienna Convention;

indeed, the United States has made clear that it disagrees with the result reached in *Avena*. Br. for U.S. as Amicus Curiae Supporting Resp't at 42, *Medellín v. Dretke*. Rather, the President directed that state courts, in cases brought before them, apply existing federal treaty law as a means of carrying that law into effect.

By its express mandate, the Supremacy Clause requires the enforcement by state courts of this Nation's treaty obligations. *See supra* Part II.A. If anything further were necessary to make that legal obligation judicially enforceable as a matter of domestic law, then the President, as the officer given the power to execute the laws, has taken that step by his determination. By doing so, he did not create any new obligation to be imposed upon the state courts, but merely removed any arguable obstacle to judicial enforcement of the relevant treaty obligations in accord with the constitutional command. At most, therefore, the President's choice of means of treaty enforcement reinforced the choice made by the Supremacy Clause. At the same time, the President's determination eliminated any possible concern that compliance by a state court with its duty to give effect to the treaty obligation by enforcing the Avena judgment might interfere with the President's conduct of the Nation's foreign affairs. *See* Part III below. There is no reason to suppose the President's determination insufficient to require compliance when he has the undoubted authority to sue to achieve the same result. *See Sanitary District*, 266 U.S. at 425-26.

III. The President's Determination That the United States Would Abide by Its Obligation to Comply with a Treaty Obligation Is a Valid Exercise of His Foreign Affairs Authority.

A. The President Has Independent Authority to Conduct the Nation's Foreign Affairs.

In addition to the power to enter into treaties with the advice and consent of the Senate, the Constitution confers on the President independent authority to formulate and execute the Nation's foreign policy. By vesting "[t]he executive Power . . . in a President of the United States of America," U.S. CONST. art. II, § 1, and by virtue of the powers "inherent" in a national government, the Constitution makes clear that the President, the "Head of State," is "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). "[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations,' " and as a result, there is no question "that there is executive authority to decide what [foreign relations policy] should be." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).[15]

In considering the authority of the President to seize private steel mills in support of the Korean War, Justice

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[15] *See also First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (the President has the "lead role . . . in foreign policy"); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him . . . as the Nation's organ in foreign affairs.").

Jackson, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), provided a means for assessing the scope of presidential powers, which "fluctuate depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Justice Jackson reasoned that presidential authority is at its maximum "when the President acts pursuant to an express or implied authorization of Congress," in a "zone of twilight" when the President "acts in absence of either a congressional grant or denial of authority," and "at its lowest ebb . . . [w]hen the President takes measures incompatible with the expressed or implied will of Congress." *Id.* at 635-38 (Jackson, J., concurring).

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), this Court applied Justice Jackson's framework to uphold Executive Orders promulgated by the President that nullified judicial attachments, effectuated transfers of certain funds out of the country, and suspended claims of American nationals against Iran in favor of binding arbitration in an international tribunal established by an executive agreement. *Id.* at 668-69. The Court upheld the President's power to nullify attachments based upon the explicit Congressional authorization given to the President under the International Emergency Economic Powers Act, 50 U. S. C. §§ 1701-1706. *Id.* at 674. The Court also held that while there was no "specific authorization" for the President to suspend claims in United States courts, there did exist strong evidence of a "history of congressional acquiescence" in unilateral action by the President to settle disputes with other nations. *Id.* at 678-79. Holding that "the President does have some measure of power to enter into Executive agreements [to settle disputes between nations] without obtaining the advice and consent of the Senate," *id.* at 682 (citing *United States v. Pink*, 315 U.S. 203, 229-30 (1942)), the Court found that the longstanding practice of the Presi-

dent to take action to settle claims to resolve "sources of friction" with foreign nations had implicit Congressional approval and thereby enjoyed a presumption of validity. *Id.* at 679-84, 686.

Most recently, in *Garamendi*, 539 U.S. 396 (2003), the Court considered whether a California statute requiring in-state insurers to disclose information about Holocaust-era policies in order to settle claims through litigation was preempted by executive agreements that required the United States to use its "best efforts" to protect such companies from litigation in exchange for the foreign companies' contributions to a claims settlement fund. *Id.* at 401, 406. Relying squarely on the President's foreign affairs authority, the Court determined that the President's settlement of claims with foreign nations required "no ratification by the Senate or approval by Congress" since "in foreign affairs[,] the President has a degree of independent authority to act" that has long been exercised, with the acquiescence of Congress, to settle claims with foreign nations. *Id.* at 414-15, 424 n.14. As a result, the Court concluded that the state statute in question impermissibly interfered with the conduct of foreign policy by the executive branch of the federal government. *Id.* at 401.

In sum, as the Court's decisions in *Youngstown*, *Dames & Moore* and *Garamendi* demonstrate, when the President acts with Congress's express or implicit approval or acquiescence, his "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *see also Dames & Moore*, 453 U.S. at 668. Even in the absence of such approval or acquiescence, the President has a degree of "independent authority" to act. *Garamendi*, 539 U.S. at 414; *see also Youngstown*, 343 U.S. at 637

(Jackson, J., concurring); *United States v. Belmont*, 301 U.S. 324, 331 (1937). And action by the President in the exercise of his foreign affairs authority preempts inconsistent state law.[16]

B. The President's Determination Lies Squarely Within His Authority to Conduct the Nation's Foreign Affairs.

Exercising his foreign affairs authority, the President has determined that the United States must comply with the *Avena* judgment. As the United States earlier explained to this Court, the President's determination involved

> delicate and complex calculations . . . taking into account the need for the United States to be able to enforce its laws effectively against foreign nationals in the United States, the need for the United States to be able to protect Americans abroad, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests.

Br. for U.S. as Amicus Curiae Supporting Resp't at 41-43, *Medellín v. Dretke*. As the United States also explained, by ordering compliance, the President pur-

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[16] *See Garamendi*, 539 U.S. at 413 ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy."); *United States v. Pink*, 315 U.S. at 230-31, 233 ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement. . . . No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Belmont*, 301 U.S. at 331-32 (state laws cannot "be interposed as an obstacle to the effective operation of a federal constitutional power").

sued two objectives he deemed critical: the need for the United States to "resolve a dispute with a foreign government" and "fulfill[ ] its international obligation," *id.* at 41, 45, and the need to preserve the United States's ability "to protect Americans abroad," *id.* at 43.

The President's determination constitutes a quintessential foreign policy judgment made at the zenith of his authority. Put simply, the President has done nothing more than determine that the United States will do what the elected representatives of the American people, by the treatymaking processes prescribed by the Constitution, have promised Mexico and the rest of the parties to the UN Charter that the United States, including Texas and its courts, will do: abide by the *Avena* judgment. In making that determination, the President entered into no new international agreements, prescribed no new rules, established no new procedures, and undertook no new obligations. Instead, he merely confirmed that the United States would comply with international commitments already made by the constitutionally designated political actors. No more modest exercise of his foreign affairs authority, nor any with clearer authorization from the appropriate political branches, could be conjured. *See* Part III.A.

Indeed, especially in light of the unequivocal treaty obligation, the President had far greater latitude than he employed. *First*, this Court has repeatedly recognized that the President has the authority to peaceably resolve disputes with other nations even without congressional participation. *See, e.g., Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 682; *Pink*, 315 U.S. at 223; *Belmont*, 301 U.S. at 330-31. In recognizing that authority, the Court has emphasized Congress's own acquiescence in the exercise of that authority. That authority is conclusive here: If, in order to settle a dispute with

another country, the President has the authority to suspend proceedings in courts in the United States, *Dames & Moore*, 453 U.S. at 686, or to preclude the application of state disclosure laws in order to preserve the efficacy of an international dispute resolution mechanism as the exclusive forum for the resolution of a class of private claims, *Garamendi*, 539 U.S. at 420-21, then the President surely has the authority to designate state courts as the forum in which to hear treaty claims arising from the state's own conduct, even if those courts were not already under a constitutional mandate to do so.[17]

Second, Congress has regularly expressed its expectation that the President will act to protect American interests abroad, including by affording reciprocal protection of foreign interests in the United States. For example, the Omnibus Diplomatic Security and Antiterrorism Act of 1986 authorizes the Secretary of State, an executive branch official who acts at the President's direction, to prescribe policies for the protection not only of foreign missions and officials but also of "other foreign persons in the United States, as authorized by law." 22 U.S.C. § 4802(a)(1)(D). In addition, the President has long had the statutory authority to use all "means, not amounting to acts of war and not otherwise prohibited by law" to secure the release of Americans wrongfully detained abroad, 22 U.S.C. § 1732, a goal

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[17] From the Nation's infancy, the federal political branches have repeatedly determined that it was within the interests of the United States to submit disputes with other nations to binding adjudication by international tribunals. *See generally* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007); Walter Dellinger, U.S. Dep't of Justice, Ofc. of Legal Counsel, *Constitutional Limitations on Federal Government Participation in Binding Arbitration* (Sept. 7, 1995) (citing and discussing authorities), *available at* http://www.usdoj.gov/olc/arbitn.fin.htm (last visited June 24, 2007).

that will often require assurances of reciprocal protections for aliens detained here. And even in the absence of statutory authorization, the President has long exercised broad authority to protect the safety and interests of Americans abroad. *See, e.g., Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (Nelson, J., at circuit).

In this case, the President has determined that "[c]onsular assistance is a vital safeguard for Americans abroad," and that "unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected." Br. for U.S. as Amicus Curiae Supporting Resp't at 41, *Medellín v. Dretke*. As the State Department told the Senate Foreign Relations Committee at the time of ratification of the Vienna Convention, "[t]he United States government has to consider the Vienna Convention both from the viewpoint of the United States as a sending state and from the viewpoint of the United States as a receiving State." S. EXEC. REP. No. 91-9, at 8 (1969) (statement of Deputy Legal Adviser J. Edward Lyerly). Indeed, the reciprocal protection of the person and property of nationals abroad has been a frequent subject of treatymaking by the United States and its treaty partners from the Nation's founding through the present day. *See, e.g., Asakura*, 265 U.S. at 341 (citing *Baldwin v. Franks*, 120 U.S. 678, 682 (1887)) ("Treaties for the protection of citizens in one country residing in the territory of another are numerous, and make for good understanding between nations.").

Finally, Congress has conferred on the President and Secretary of State the responsibility for conducting our relationship with the United Nations. *See* 22 U.S.C. §§ 287(a), 287a. That grant should encompass the

authority to determine the means by which the United States will comply with its obligation under the UN Charter to abide by a decision of the ICJ, which is an organ of the United Nations.

C. No Additional "Executive Agreement" Is Needed.

The Texas court made explicit that "[t]he absence of an executive agreement between the United States and Mexico [was] central to [its] determination that the President ha[d] exceeded his inherent foreign affairs power by ordering [that court] to comply with *Avena*." Pet. App. 46a. According to the Texas court, the absence of such an agreement rendered *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* inapposite and placed the President's authority " 'at its lowest ebb.' " *Id.* at 44a-45a.

Contrary to the Texas court's assumption, the President does not need Mexico's permission in order to determine that the United States will comply with its treaty obligation or, for that matter, to choose the means of compliance. *First*, the President here acted pursuant to a series of treaties, comprising the UN Charter, the ICJ Statute, and the Optional Protocol, each of which mandates compliance with the *Avena* judgment. Hence, the international agreement the Texas plurality so desperately sought can easily be found, if needed, in those treaties, which—unlike executive agreements—are instruments of a type expressly provided for in the Constitution and have received the assent not only of the President but also the Senate.

Second, it is not clear what the Texas court thought needed to be settled in the negotiations over an implementing executive agreement. Given its initiation and pursuit through judgment of *Avena*, and the briefs it has filed in this Court calling on the United States to com-

ply, there can be no doubt that Mexico seeks compliance. And surely the Texas court did not mean to suggest that the President needed to settle with Mexico on the means by which it would comply. For one thing, the ICJ made clear that, so long as the means satisfied the criteria set forth in the judgment, the United States could provide review and reconsideration "by means of its own choosing." *Avena*, ¶ 153(9) (*dispositif*) (Pet. App. 185a). For another, the Constitution provides that means for the United States, in any event, by way of the mandate to state courts in the Supremacy Clause.

Finally, contrary to the Texas court's assumption, an executive agreement has no special constitutional significance, and the President need not exercise his foreign affairs authority in accord with any particular procedure. This Court has given preemptive effect to executive agreements because to do otherwise would allow states to interfere in the President's conduct of the Nation's foreign affairs authority. But the President may exercise its foreign affairs authority in other ways as well: This Court has inferred an executive agreement from exchanges of correspondence, *Belmont*, 301 U.S. at 326, and has even gleaned a national foreign policy sufficient to preempt state law from the congressional testimony of executive branch officials, *Garamendi*, 301 U.S. at 326.[18]

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[18] Moreover, contrary to the position taken in Judge Cochran's concurrence, no special formality is required for a presidential memorandum, determination or other directive to be legally effective. The legal effect of presidential action depends on its substance, not the form in which it was issued. *Wolsey v. Chapman*, 101 U.S. 755, 770 (1880); Dep't of Justice, Ofc. of Legal Counsel, Mem. for Counsel to President, *Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order* (Jan. 29, 2000), *available at* http://www.usdoj.gov/olc/predirective.htm (last visited June 24, 2007). Over the years, Presidents have issued not only Executive Orders and

IV. The Texas Procedural Bar Applied by the Texas Court Is Preempted.

The UN Charter, the ICJ Statute, and the Optional Protocol obligate the United States, including its constituent states and their courts, to abide by the *Avena* judgment as a matter of international law. *See* Part I.A above. The Supremacy Clause makes that obligation part of federal law, *see* Part I.B above, and requires state courts to enforce it, *see* Part II.A above. In addition, exercising his authority to take care that the United States's treaty obligations be faithfully executed and his authority to conduct the United States's international affairs, the President has determined that the United States will discharge its obligations under *Avena* by giving effect to that decision in state courts. *See* Parts II.B and III above. Hence, as a matter of preemptive federal law, the Texas Court of Criminal Appeals had an obligation to apply the *Avena* judgment on Mr. Medellín's application for review and reconsideration.

The *Avena* judgment requires the United States to provide, as a remedy for the Article 36 violation, "review and reconsideration of the conviction[ ] and sentence[ ] of" Mr. Medellín, "by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of [that] Judgment." *Avena*, ¶ 153(9) (*dispositif*) (Pet. App. 185a). Moreover, the process by which the review and reconsideration is effected must "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account." *Id.* ¶ 138 (Pet. App.

Proclamations but also a wide variety of other types of directives. *See generally* CRS Report for Congress, *Presidential Directives: Background and Overview*, No. 98-611 GOV (updated April 23, 2007). Judge Cochran's suggestion that the President can take effective action only through a formal Executive Order or Proclamation published in the *Federal Register* lacks any legal support.

173a). Hence, a procedural bar that prevents the Texas court from giving effect to *Avena* "must give way." Br. for U.S. as Amicus Curiae Supporting Resp't at 43, *Medellín v. Dretke*.

In order to obtain the review and reconsideration to which he is entitled, Mr. Medellín invoked the mechanism available under Texas law by filing an application for post-conviction relief in the Texas Court of Criminal Appeals. *See* Tex. Code Crim. Proc. art. 11.071. That court, however, refused to order the review and reconsideration of Mr. Medellín's case required by *Avena*. Instead, it held that relief was foreclosed by a Texas procedural default statute, Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), because the Vienna Convention violation arose from facts and law in existence at the time of Mr. Medellín's original trial. Pet. App. 56a-64a. By refusing to provide the review and reconsideration required by *Avena* on the basis of a procedural bar that fell before that remedy was ordered, the Texas court contravened the requirements of *Avena*.

The Texas procedural default statute, as interpreted and applied by the Texas Court of Criminal Appeals, is thus flatly inconsistent with the treaties requiring the United States to abide by the *Avena* decision, which requires review and reconsideration of Mr. Medellín's conviction, and with the President's determination, which requires that the *Avena* decision be given effect in Mr. Medellín's case. Thus, the Texas statute is preempted in the circumstances of this case, and the Texas court erred in applying it.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court reverse the judgment of the Texas Court of Criminal Appeals and remand petitioner's case for review and reconsideration consistent with the *Avena* judgment and the President's determination.

Respectfully submitted,

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June 28, 2007

(21)

No. 06-984

Supreme Court, U.S.
FILED
AUG 2 3 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSÉ ERNESTO MEDELLIN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), the International Court of Justice determined that, based on violations of the Vienna Convention, 51 named Mexican nationals, including Petitioner José Ernesto Medellín, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. Subsequently, the President issued a "Memorandum for the Attorney General" ("Presidential Memorandum"), stating that he had determined that the United States would "discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

This case presents the following questions:

1. Does the Presidential Memorandum constitute binding federal law, and does it preempt the Texas criminal procedure statute governing the jurisdiction of state courts to review subsequent habeas applications?

2. Is *Avena* a binding judgment enforceable by a private party in a domestic court?

3. Have Texas courts already provided the merits review of Medellín's conviction and sentence that was required by *Avena*?

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STATEMENT OF THE CASE

The Crime: Petitioner's Statement of the Case begins in October 1994, when José Ernesto Medellín was sentenced to death for capital murder. Pet'r Br., at 2. But this case began over a year earlier, on June 24, 1993. That evening, fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were returning home from visiting a girlfriend when, tragically, they took a shortcut. At around 11:15 p.m., they encountered Medellín and his fellow members of the "Black and Whites" gang, who had assembled to fight with and then initiate a new member, Raul Villareal. *Medellín* v. *State*, No. 71,997 (Tex. Crim. App. 1997); Resp. App., at 3.[1]

As the girls passed Medellín, he attempted to engage Elizabeth in conversation. *Id.*, at 4. When she tried to run, Medellín grabbed her and threw her to the ground. *Id.* Elizabeth screamed for Jennifer's help, but when Jennifer ran back she was grabbed by gang members Sean O'Brien and Peter Cantu and also thrown to the ground. *Id.*

As Medellín later confessed, what ensued was the brutal gang rape and murder of both Jennifer and Elizabeth. *Id.*, at 4-5. The gang members orally, vaginally, and anally raped both of them. *Id.* When they were done, they strangled both girls to death. *Id.*, at 5.

Later that evening, Medellín and other gang members went to Cantu's house, where he lived with his brother and sister-in-law, Joe and Christina Cantu. *Id.*, at 4. Christina asked the group what they had done that evening, and Medellín responded that they had "had fun" and that their exploits would be seen on the television news. *Id.* Medellín described to Joe and Christina how he had punched one of the girls because she had started screaming after he grabbed

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[1] Respondent is submitting a separately bound Appendix with its brief consisting of record materials before the Court in *Medellín* v. *Dretke*, 544 U.S. 660 (2005) (*Medellín I*), and contained in the Petitioner's Appendix and the Joint Appendix in *Medellín I*. Materials contained in the Appendix to Respondent's Brief will be referenced herein as "Resp. App." followed by the page numbers.

her. *Id.* Medellín went on to recount gang-raping both girls and showed them his blood-soaked underwear. *Id.*

When Christina asked the group what had happened to the girls, Medellín told her they had both been killed so they could not identify their attackers. *Id.*, at 5. Medellín explained that killing the girls would have been easier with a gun, but because they did not have one, he took off one of his shoelaces and strangled one of the girls with it. *Id.* Medellín complained of the difficulty in killing Jennifer and Elizabeth, relating that he had to put his foot on the throat of one of the girls because she would not die. *Id.*

Medellín and his gang members then divided up the money and jewelry taken from Jennifer and Elizabeth. *Id.* Medellín's brother kept one of the girls' Disney-brand Goofy watch, 30 TR. 640-42; 32 TR. 808;[2] Resp. App., at 36, and Medellín kept a ring belonging to Jennifer with an "E" design – which he later gave to his girlfriend, Resp. App., at 5.

After hearing Medellín's grisly tale, Christina Cantu convinced her husband in the ensuing days to report the crime to the police. *Id.* By the time Jennifer and Elizabeth's bodies were found, they were badly decomposed and identifiable only through dental records. *Id.* Based on the pattern of decomposition, the medical examiner determined that each girl had suffered enormous trauma to the genital region, 32 TR. 851-58, 872-75, 895, 897, 900-01, and had died of trauma to the neck consistent with strangulation, Resp. App., at 5-6.

At approximately 4:00 a.m. on June 29, 1993, Medellín was arrested. 30 TR. 629-30. Some two hours later, between 5:54 and 7:23 that morning, Medellín read his *Miranda* warnings aloud, signed a written waiver, and gave a detailed written confession of the crime. *See* Resp. App., at 32-36. His confession detailed, *inter alia*, how each girl had pleaded for her life, prior to being murdered. *Id.*, at 34.

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[2] "TR." refers to the reporter's record, preceded by the volume number and followed by the page numbers.

Although born in Mexico, Medellín has lived in the United States most of his life. 35 TR. 282-83. Medellín speaks, reads, and writes English, 30 TR. 648; 31 TR. 687; 35 TR. 283, and attended American public schools since elementary school, 30 TR. 648, 670; 35 TR. 283, 289-90. Nevertheless, he remains a citizen of Mexico, and the local law enforcement officers failed to notify him of his Vienna Convention right to notify his consulate. Pet'r Br., at 5.

Medellín was tried and convicted of murder during the course of a sexual assault, a capital offense. 33 TR. 66-68. The jury unanimously recommended a death sentence, and the district court sentenced Medellín to death. *Medellín I* Pet. App. 3a. At no point during trial, sentencing, or the subsequent direct appeal, did Medellín – who had the assistance of two court-appointed attorneys – assert any claim under the Vienna Convention.

Medellín's Appeal and First State Habeas Application: The Texas Court of Criminal Appeals affirmed Medellín's conviction and sentence in an unpublished opinion. *See* Exhibit B to Medellín's Application for Writ of Habeas Corpus ("First Application"). Rather than petition this Court for certiorari, Medellín contacted the Mexican consulate, and the consular authorities began assisting him with a state habeas corpus application. Eleven months later, Medellín filed his First Application seeking habeas corpus relief.

In his First Application, Medellín asserted for the first time that the failure to notify him of his right to inform the Mexican consulate of his arrest for capital murder violated his rights under the Vienna Convention on Consular Relations. *See* First Application at 25.[3] The district court rejected his Vienna Convention claim because, *inter alia*, it found that he failed to show that he was harmed by any failure to

[3] The only harm that Medellín alleged in his First Application as arising from the failure to notify him of his rights under the Vienna Convention was that his confession should not have been considered by the jury because it was "obtained in violation of the Vienna Convention on Consular Relations." First Application at 31.

notify the consulate. Specifically, the district court found that Medellín "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." Resp. App., at 62. The Texas Court of Criminal Appeals found the trial court's conclusions to be supported by the record and denied relief. *Id.*, at 64-65.

Federal Habeas Proceedings in the District Court and the Fifth Circuit: After his First Application was rejected, Medellín filed a petition for a writ of habeas corpus in federal district court. *See Medellín* v. *Cockrell*, No. H-01-4078 (S.D. Tex. June 26, 2003); Resp. App., at 66-127. Medellín claimed that he should receive a new trial because he had not been advised of his right to consular notification under the Vienna Convention. *Id.*, at 86.

The federal district court rejected that claim, holding that Medellín's failure to raise his Vienna Convention claim at trial as required by Texas's contemporaneous-objection rule constituted an adequate and independent state ground barring federal habeas review. *See id.*, at 86-92. Applying the Court's decision in *Breard* v. *Greene*, 523 U.S. 371, 375-76 (1998) (per curiam), the court also rejected Medellín's argument that Vienna Convention claims are exempt from the procedural-default doctrine. Resp. App., at 87-88.[4] Finally, the federal district court, like the state courts, rejected Medellín's Vienna Convention claim on the merits. The court expressly found that Medellín "failed to show prejudice for the Vienna Convention violation," *id.*, at 92, and concluded that the state

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[4] Medellín argued that the federal court should follow the post-*Breard* decision of the International Court of Justice in *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). In *LaGrand*, the ICJ determined that the consular notification provisions in Article 36 of the Vienna Convention created individual rights, and that the application of procedural default to preclude the LaGrands from challenging their convictions violated Article 36(2) of the treaty by "preventing 'full effect [from being] given to the purposes for which the [consular notification] rights accorded under this article are intended.'" *Id.*, ¶91, at 497-98. Noting the conflict between *LaGrand* and *Breard*, the district court declined to follow *LaGrand*'s holding that procedural default should not apply to Vienna Convention claims. Resp. App., at 89-91.

court's determination that he failed to show "concrete, non-speculative harm" was not "'contrary to, or an unreasonable application of, federal law.'" *Id.* (quoting 28 U.S.C. §2254(d)(1)). The district court denied both Medellín's claim for habeas relief and declined to grant a certificate of appealability. *Id.*, at 126.

Medellín subsequently applied to the Fifth Circuit for a COA, which was denied. *See Medellín* v. *Dretke*, 371 F.3d 270 (CA5 2004); *Medellín I* Pet. App. 119a-135a.[5] While Medellín's application for COA was pending in the Fifth Circuit, the ICJ issued its decision in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31); Appendix to the Petition ("Pet. App.") at 86a-186a.

In *Avena*, the ICJ concluded that the United States had violated Article 36 of the Vienna Convention in the case of Medellín and 50 other Mexican nationals. *Id.*, at ¶¶106, 153; Pet. App. 155a-57a, 182a-85a. The ICJ rejected Mexico's request for annulment of the convictions and sentences, and concluded that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of the sentences and convictions of Medellín and the other 50 Mexican nationals. *See id.*, at ¶¶14, 121-23, 153(9); Pet. App. 106a-07a, 165a-66a, 185a. The ICJ further ordered that the "review and reconsideration" must take place within the judicial system of the United States, and that the doctrine of procedural default could not bar such review. *See id.*, at ¶¶111-13, 120-22, 133-34, 138-41; Pet. App. 159a-61a, 164a-65a, 170a-71a, 173a-74a.

The Fifth Circuit acknowledged the ICJ's decisions in *Avena* and *LaGrand*, but concluded that it was bound instead by this Court's decision in *Breard* that Vienna Convention claims are subject to procedural default. *See Medellín I* Pet. App. 132a. The court also held that Medellín could not prevail because a prior Fifth Circuit panel had held that Article 36 of

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[5] Citations to materials in the Appendix to Medellín's prior petition for a writ of certiorari submitted in *Medellín I* will be referenced herein as "*Medellín I* Pet. App.," followed by the page number(s).

the Vienna Convention does not create an individually enforceable right. *Id.*, at 133a.

***Medellín I*: Medellín's First Petition for a Writ of Certiorari:** The Court granted certiorari to resolve two questions: (1) whether a federal court was bound by the ICJ's *Avena* decision that U.S. courts must reconsider Medellín's Vienna Convention claim without regard to procedural default doctrines; and (2) whether a federal court must give effect to the ICJ's *Avena* decision as a matter of judicial comity and uniform treaty interpretation. *Medellín* v. *Dretke*, 544 U.S. 660, 661 (2005) (per curiam) (*Medellín I*).

While the case was pending before the Court, the President issued a document styled as a "Memorandum for the Attorney General." Pet. App. 187a. The operative language of the memorandum reads as follows:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." *Id.*

The U.S. Attorney General then mailed the memorandum to various state officials, including the Attorney General of Texas. Pet. App. 76a. After the Presidential Memorandum issued, Medellín filed a subsequent state habeas application. The subsequent application relied on the memorandum and the *Avena* decision as separate bases for relief that had not been available when he filed his first state habeas application. *Medellín*, 544 U.S., at 663-64. Based in part on both the Presidential Memorandum and the filing of Medellín's subsequent state habeas application, the Court dismissed the writ as improvidently granted. *Id.*, at 666-67.

Proceedings in the Texas Court of Criminal Appeals on Medellín's Subsequent Application for State Habeas Relief: Under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure, Texas courts lack jurisdiction to consider

the merits of any claims raised on a subsequent habeas application, or grant relief on such claims, unless the applicant provides specific facts demonstrating that:

> "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." TEX. CODE CRIM. PROC. art. 11.071, §5(a)(1);[6] *see also Ex parte Graves*, 70 S.W.3d 103, 115 (Tex. Crim. App. 2002).

In support of his subsequent habeas application, Medellín argued that the *Avena* decision and the Presidential Memorandum constituted binding federal law that preempt Article 11.071. *See* Br. of Applicant, at 26-27. Alternatively, Medellín argued that he met the requirements of Article 11.071 because *Avena* and the Presidential Memorandum constituted factual and legal bases that were unavailable when he filed his first state habeas application. *Id.*, at 52-53.

The Texas Court of Criminal Appeals disagreed. It rejected Medellín's claim that *Avena* preempts Article 11.071, concluding that in *Sanchez-Llamas* this Court considered and rejected the argument that ICJ decisions are binding federal law. Pet. App. 21a-24a. It also rejected Medellín's argument that the Presidential Memorandum preempts Article 11.071 and requires Texas courts to review and reconsider Medellín's conviction and sentence. Although all of the members of the Court of Criminal Appeals agreed that the Presidential Memorandum did not preempt Article 11.071, the court did not generate a majority opinion on this issue. *See* Pet. App. 1a, 24a-55a, 64a-71a, 74a-79a.

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[6] Although both Petitioner and the United States urge this Court that Article 11.071 should be preempted, neither quotes or discusses in any way the text of that provision of the Texas Code of Criminal Procedure.

Judge Keasler's plurality opinion,[7] Pet. App. 24a-55a, assumed – without deciding – that the memorandum constituted an executive order requiring Texas's compliance. Pet. App. 24a-25a. The plurality observed, however, that, "[e]xecutive orders issued by the President must be authorized by an act of Congress or by the Constitution." Pet. App. 27a (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952)). Treating the Presidential Memorandum as an order intended to bind Texas courts, the plurality considered the memorandum to be an "unprecedented" exercise of executive power, Pet. App. 29a, and held that the President had exceeded his constitutional authority "by intruding into the independent power of the judiciary." Pet. App. 30a. The plurality also concluded that the Presidential Memorandum – like the *Avena* decision itself – improperly attempts to invest the ICJ with the power to determine the meaning and effect of a treaty as a matter of United States domestic law. *See id.*

Presiding Judge Keller filed a concurring opinion stating that the President does not have the power to order a state court to ignore rules of procedural default and statutes governing successive habeas corpus petitions. Pet. App. 64a-65a. She observed that the Court has typically declined to construe executive agreements or treaties as preempting state laws involving "traditional area[s] of state competence and applied equally to citizens and non-citizens," Pet. App. 67a, most recently in the *Sanchez-Llamas* decision recognizing that the Vienna Convention does not preempt state rules of procedural default, *id.* (citing *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669, 2682-88 (2006)). She went on to conclude that, to the extent that the President is purporting to preempt state criminal procedure statutes through his memorandum, he is not acting pursuant to any authorization conferred by the Vienna Convention or the Optional Protocol. *See id.* Based on this analysis, Presiding Judge Keller concluded that the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system

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[7] This opinion was joined by Judges Meyers, Price, and Hervey. Pet. App. 1a.

cannot be supported by the foreign policy authority conferred on him by the United States Constitution." Pet. App. 71a.[8]

Finally, the Court of Criminal Appeals held that, as a matter of state law, neither *Avena* nor the Presidential Memorandum constituted a previously unavailable "factual basis" or "legal basis" for Medellín's habeas claims, and therefore his subsequent application did not meet the requirements of Article 11.071 so as to permit jurisdiction to provide review of his Vienna Convention claim. Pet. App. 56a-64a.[9]

SUMMARY OF THE ARGUMENT

This is a separation of powers case. It implicates every axis of the structural limitations on government: President vis-à-vis Congress, President vis-à-vis the Supreme Court, international law vis-à-vis domestic law, federal government vis-à-vis the States, and, with a Möbius twist, President vis-à-vis the state judiciary. Each of the structural limits on government serves to diffuse power and to safeguard the citizenry, and only by ensuring the vitality of those democratic checks on unilateral authority can liberty be secured.

The United States defends the Presidential Memorandum, as it must, while candidly admitting that it represents an "unprecedented action." For good reason: The Presidential Memorandum transgresses the authority of Congress, of the judiciary, and of the States.

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[8] Judge Hervey and Cochran also filed opinions concurring in the court's decision that the Presidential Memorandum does not preempt Article 11.071. Pet. App. 74a-79a. Judge Hervey, referencing the alternative merits holding in Medellín's First Application that he failed to establish that he suffered any prejudice from the Vienna Convention violation, concluded that the "review and reconsideration" required by *Avena* and the Presidential Memorandum has already occurred, and the case therefore presents no actual controversy. Pet. App. 74a. Judge Cochran could not "accept the proposition that binding federal law . . . can be accomplished through a Presidential press release of a private memorandum directed to the Attorney General." Pet. App. 78a-79a.

[9] Medellín's Petition for Writ of Certiorari does not ask the Court to review this state-law determination of the Court of Criminal Appeals.

The Presidential Memorandum contradicts the express understanding under which the Senate ratified the Vienna Convention, the UN Charter, and the Optional Protocol. The Senate understood – and, until recently, the Executive Branch embraced – three key limitations on those treaties. First, they create no individual rights. Second, they are enforceable politically and diplomatically, through the Security Council, and not through domestic courts of law. And third, they were not intended to alter preexisting U.S. law. The United States agrees that these three limitations inhere to the treaties, but, nonetheless, the Presidential Memorandum purports to create individual rights, to make them enforceable in state courts, and to displace neutral state laws of criminal procedure. Because the memorandum attempts to mandate an outcome antithetical to that contemplated by the Senate, and because that outcome also conflicts with the policy judgments of Congress expressed in the AEDPA, the Presidential Memorandum is contrary to the will of Congress.

The Presidential Memorandum also intrudes onto the constitutional role of the judiciary, in two respects. First, this Court, in *Sanchez-Llamas*, definitively interpreted – as a matter of federal law – the domestic import of *Avena* and the applicability of the procedural default doctrine to violations of the Vienna Convention. Nonetheless, the United States contends, state courts should obey the memorandum – and not this Court's decision in *Sanchez-Llamas* – in adjudicating those same questions. Under the most foundational principles of *Marbury* and Article III, it is emphatically not the province of the President to say what federal treaty law is, nor how *Avena* or the Vienna Convention should be interpreted. Second, the memorandum impermissibly attempts to reopen final criminal judgments, and to order the state courts to do what the federal courts could not.

The Presidential Memorandum also intrudes onto the sovereignty of the States. The memorandum purports to expand the jurisdiction of the state courts, beyond what state law allows, and to commandeer state judges into service of the federal Executive. Our Federalism allows no such dictates.

Finally, to avoid constitutional doubt, the Court should construe the memorandum as a request, not a command. In the alternative, because both the state and federal habeas courts expressly found that the Vienna Convention violation produced no actual prejudice, the Court should conclude that the "review and reconsideration" required by *Avena* and the Presidential Memorandum has already occurred, and so Petitioner's claim is moot.

The United States may comply with *Avena*, if it chooses, but it must do so in a way consonant with the constitutional limitations. Several avenues are available, but all require working in conjunction with either Congress or the States. Thus, by mandating inter-branch cooperation, the Constitution protects liberty and prevents unilateral fiat, in derogation of laws adopted by democratically elected legislatures.

ARGUMENT

Petitioner's argument is relatively straightforward. Proceeding from the premise that he advanced in *Medellín I* – and that this Court rejected in *Sanchez-Llamas* – he urges that the "judgment of the ICJ" is "binding" on the United States and on "all its judicial organs." Pet'r Br. 20. Hence, this Court may no more decide the matter differently from the ICJ than could a federal district court disregard a holding of this Court. That understanding of the relationship between this Supreme Court and the ICJ is profoundly wrong, see Part VII, *infra*, but it at least has the virtue of analytical consistency.

The position of the United States, however, is considerably more nuanced. The United States does not embrace – indeed, it emphatically rejects – Petitioner's views concerning the domestic reach of the ICJ and the Vienna Convention. Thus, the United States agrees with Texas on the following:

- The Vienna Convention creates no individual rights.
- Neither the Vienna Convention, the UN Charter, nor the Optional Protocol are "self-executing" in the broader sense; that is, none of them (absent more) are judicially enforceable in U.S. courts.

- The ICJ's decision in *Avena* was, as a matter of federal law, wrong, and it too (absent more) cannot be enforced in U.S. courts.

Thus, with those predicates – and forswearing Petitioner's reliance on broader theories of international law – the United States nonetheless is forced to defend the Presidential Memorandum as a valid exercise of Executive authority. Because, the argument goes, the United States has a diplomatically-enforceable treaty obligation to comply with decisions of the ICJ, the President may choose whatever means of doing so – including setting aside state law – without securing the concurrence of any other branch of government.

To be sure, Texas recognizes the existence of an international obligation to comply with the United States's treaty commitments, including, as appropriate, through changes to domestic law. And the Presidential Memorandum surely reflects the President's genuine desire to "reaffirm[] the United States commitment to the international rule of law." U.S. Br., at 4. However, a laudable goal does not give the President unlimited power to act beyond his constitutional authority. As the Court has recognized, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York* v. *United States*, 505 U.S. 144, 187 (1992).

Thus, the Constitution requires interbranch cooperation between the President and Congress before an ICJ decision can become judicially cognizable domestic law. As the Court has long recognized, "'The power to make the necessary laws is in the Congress; the power to execute in the President.'" *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749, 2773 (2006) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866)).

The United States has candidly acknowledged that the Presidential Memorandum is "an unprecedented action."[10]

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[10] *See* Brief of the United States as Amicus Curiae Supporting Respondent, at 29-30 submitted in *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669 (2006) [U.S. Br. in *Sanchez-Llamas*].

And this "unprecedented" assertion of sweeping presidential authority runs afoul of fundamental canons of separation of powers and federalism. It infringes on the authority of Congress, it infringes on the constitutional role of the judiciary, and it infringes on the sovereignty of the States.

I. THE PRESIDENTIAL MEMORANDUM IMPERMISSIBLY INTRUDES ON THE AUTHORITY OF CONGRESS.

Because the Presidential Memorandum impermissibly usurps Congress's authority to transform international law obligations into domestic rules of law, and because it is likewise incompatible with the will of Congress concerning the domestic effect of ICJ decisions, it falls outside the ambit of unilateral presidential action.

A. The President Lacks Authority to Unilaterally Transform an International Obligation into Domestic Law.

1. The creation of domestic law incident to treaties requires interbranch cooperation between the President and Congress.

Not every treaty creates domestic law rights, obligations, or powers. Rather, the general rule is that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §907, cmt. (A) (1987). This rule derives from the longstanding principle that "[a] treaty is primarily a compact between independent nations," and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Accordingly, where a treaty does not "by its own force,"[11] create law cognizable in domestic courts, the President and the Senate have made a decision that the treaty remains unenforceable in the courts without further congressional action. Thus, unless the text of the treaty reflects an agreement between the President and the Senate to create domestic law, no such law is made.

This requirement stems from the text of the Constitution, which divides the federal government's treaty-making authority between the President and Congress. The President has a general power to "make" treaties, but Article II, Section 2, qualifies that power by requiring the consent of two-thirds of the Senate before a treaty becomes the "supreme Law of the Land." Accordingly, the President is bound by the reservations, understandings, or other conditions imposed by the Senate upon granting its consent. *See* RESTATEMENT (THIRD) §314, cmt. b ("Since the President can make a treaty only with the advice and consent of the Senate, he must give effect to conditions imposed by the Senate upon its consent."). Such conditions necessarily include a treaty's effect in domestic law.[12]

Similarly, outside the treaty-ratification process, the Constitution provides Congress, not the President, the power to transform an international obligation into domestic law. That authority flows from the Necessary and Proper Clause of Article I, which allocates to Congress the authority to "carry [] into Execution . . . all other Powers vested by this Constitution" in the federal government, U.S. CONST. art. I, §8, cl. 18, including the Article II treaty power. *See Missouri* v. *Holland*, 252 U.S. 416, 431-32 (1920). Thus, when a treaty does not of

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[11] *See, e.g.*, *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) (describing a treaty directly enforceable in domestic courts).

[12] For example, the Senate has typically declared that human rights treaties are not self-executing. *See* Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1994); Comm. on Foreign Relations, Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. EXEC. REP. NO. 101-30, at 30-31 (1992).

its own force create directly enforceable domestic law, Congress has the authority to enact implementing legislation.

The Court has long recognized that the responsibility for transforming an international law obligation into a domestic rule of law falls to Congress, not the President. Chief Justice Marshall enunciated this principle in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829): where a treaty merely represents a promise of the United States under international law, "the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject." *Id.*, at 315; *see also Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect. . . ."). Although treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Igartua-De La Rosa* v. *United States*, 417 F.3d 145, 150 (CA1 2005) (en banc).

2. The President is limited to executing, not creating, the law.

The United States's sweeping assertion of presidential power to create domestic law also suffers from an arguably more fundamental problem. Whatever the proper scope of the President's implied foreign-affairs powers are under Article II, this Court has consistently recognized that such powers are limited to executing, not creating, the law.

As the Court explained in *Youngstown*, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown*, 343 U.S., at 587-88. The Court reaffirmed this principle just last Term in *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006), in its rejection of unilateral executive authority to create special military tribunals beyond the scope of congressional authorization, *id.*, at 2773.

The application of this fundamental separation-of-powers principle is particularly important where, as here, the unilateral action of the Executive Branch directly infringes on the States' authority as sovereigns to order their own judicial departments and criminal-justice systems. *See* Part III.A, *infra*. Congress must be involved in political decisions, such as the one here, that threaten the sovereign capacity of the individual states. As the Court explained in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the States' representation in Congress injects the "political safeguards of federalism" into the political process. *Id.*, at 551 n.11. As one prominent commentator has observed, "[t]he proposition that the President may, by reaching an agreement with a foreign head of state, essentially destroy the sovereign power of one of the United States is not easily reconcilable with the deep-seated notion that *Congress* is the branch of the national government that is to be trusted most to protect state sovereignty." 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §4-4, at 648 (3d ed. 2000) (emphasis in original).

B. The Presidential Memorandum Reflects an Assertion of Presidential Power at Its "Lowest Ebb" Under *Youngstown*.

The validity of a President's exercise of his foreign-affairs power has traditionally been evaluated under the familiar tripartite test for whether his actions are undertaken (1) with the express or implied authorization of Congress, (2) in the absence of congressional authorization or denial of authority, or (3) in contravention of the will of Congress. *See Youngstown*, 343 U.S., at 635 (Jackson, J., concurring). The United States constructs much of its argument upon its foundational premise that the Presidential Memorandum falls within the first *Youngstown* category, where presidential power is at its zenith. U.S. Br., at 10-11. That premise is false.

The United States's attempt to characterize this case as a *Youngstown* "category one" case is based on the simple observation that the Senate ratified the Vienna Convention, the UN Charter, and the Optional Protocol. That is certainly

true. But it did so with a very different understanding of how those treaties would affect U.S. law.

As interpreted by the Department of Justice, the Presidential Memorandum has the effect of (1) creating individual rights for the 51 named Mexican nationals, (2) empowering (indeed requiring) state courts and this Court to enforce those rights, (3) preempting neutral, generally applicable state criminal laws, and (4) reopening final criminal judgments in state court.

When one assays what the Senate actually understood and ratified – and compares it to the legal effect now urged by the United States – there can be no other reasonable conclusion but that the Presidential Memorandum is contrary to the will of Congress, and therefore at the "lowest ebb" of presidential power. This is so for four separate reasons. *First*, the memorandum contravenes the Senate's express understanding, manifest when it ratified the Vienna Convention, that the treaty created no individual rights. *Second*, it contradicts the Senate's express understanding, manifest when it ratified the UN Charter and the Optional Protocol, that ICJ decisions can be enforced only through diplomatic or political means. *Third*, by attempting to alter the very structure of the Texas system of criminal procedure, the memorandum also conflicts with the Senate's express understanding that the United States's obligations under the Vienna Convention did not include any changes in domestic law. And *fourth*, the Presidential Memorandum is incompatible with the deference to state court criminal procedures required by Congress in the AEDPA.

1. The Senate ratified the Vienna Convention with the express understanding that it created no individual rights.

As the United States has exhaustively and persuasively argued, *see* U.S. Br. in *Sanchez-Llamas*, at 11-30, when the Senate ratified the Vienna Convention, it did so with the explicit understanding that the treaty did not create individual rights. The best evidence of what the Senate had before it is the actual text. The Convention expressly provides,

> "the *purpose* of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals*

but to ensure the performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).

Not only is the text explicit, the structure is clear. Chapter II of the Convention, in which Article 36 appears, is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post." Its focus is the prerogatives of the "sending State," not individual foreign nationals. Article 36 is in Section I of Chapter II – a Section titled "Facilities, Privileges and Immunities Relating to a Consular Post." Notably, it is not found in Section II, which deals with facilities, privileges, and immunities of individuals, *i.e.*, consular officers and other "members of the consular post."

In keeping with the overall purpose of the Convention, Article 36 begins with the express statement that the provisions of paragraph (1), including the requirements of consular notification at issue in this case, are established "*with a view to facilitating the exercise of consular functions* relating to nationals of the sending State" (emphasis added).

Although Article 36 may provide some collateral benefits to individual foreign nationals, its overriding purpose (as it notes explicitly) is to facilitate the performance of consular functions by consular officials. Looking to its drafting history, the text of Article 36 was submitted to the UN Conference by the International Law Commission (ILC). The Article's proponent on the ILC, Sir Gerald Fitzmaurice, explained that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue." *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n U.N. Doc. A/CN.4/SER.A/1960, at 49. Instead, the consular notification provisions "were intended to provide a consul with the means of carrying out the function of protection." *Id.*[13]

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[13] Likewise, Mr. Erim expressly agreed "that the proposed new article . . . dealt with the rights and duties of consuls and *not with the protection of human rights* or the status of aliens." *Id.* (emphasis added).

Indeed, the ILC drafters explained further that, "where a country did not carry out a provision of a convention, it would naturally be estopped from invoking that provision against other participating countries," *id.* – a proposed remedy that clearly illustrates their focus was on the rights of nations, not individuals.[14]

As the United States has succinctly explained, at the time of ratification, the Vienna Convention was simply "not understood to have the *radical effect* of creating individual rights." U.S. Br. in *Sanchez-Llamas*, at 22 (emphasis added). Of course, that "radical effect" – unforseen and unintended by the Senate – is precisely what the Presidential Memorandum now purports to accomplish.

2. The Senate ratified both the UN Charter and the Optional Protocol with the express understanding that decisions of the ICJ were not judicially enforceable.

The UN Charter and the ICJ's statute together delineate the scope of the ICJ's authority. The ICJ can hear only disputes between nations, Statute of the International Court of Justice art. 34, para. 1, 59 Stat. 1055 (1945) (hereinafter ICJ Statute), and then only when those nations have expressly consented to the ICJ's jurisdiction, *see* Vienna Convention, art. 36(2) & (3).[15] ICJ decisions have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute, *id.* art. 59.

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[14] The Senate's understanding that the Vienna Convention created no individual rights mirrored that of every other signatory. As the United States observed, "[n]either petitioners [in *Sanchez-Llamas*] nor their amici offer a single unambiguous example in the 40-year history of the Vienna Convention from any of its 161 parties of an individual defendant being afforded a remedy in his criminal case on the basis of a Vienna Convention violation." U.S. Br. in *Sanchez-Llamas*, at 8.

[15] UN members have the option of submitting to the Court's full "compulsory jurisdiction" under article 36(2), or subject to specific reservations under article 36(3). Otherwise, jurisdiction can be by special agreement or by treaty under article 36(1).

Indeed, the ICJ statute specifies that, in all other instances, decisions of the court have "no binding force." *Id.*[16]

As a result, the ICJ lacks jurisdiction to declare individual rights, and its decisions have no *res judicata* effect on disputes between individual persons. *See, e.g., Socobel* v. *The Greek State*, 30 Avril 1950, 18 I.L.R. 3. ICJ judgments are "final and without appeal," but there is no rule regarding the application of those decisions before other tribunals. ICJ Statute art. 60.

Nor does the ICJ have direct enforcement powers. Instead, the Security Council enforces ICJ judgments in its political discretion. Article 94 of the UN Charter expressly provides:

> "1. Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party *may have recourse to the Security Council*, which may, *if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment." UN Charter art. 94 (emphases added).

Thus, while there exists in principle an international law obligation to respect the ICJ's judgments, ultimate enforcement power is given not to the ICJ – nor to the domestic courts of signatory nations – but to the Security Council, which exercises the political and institutional authority to enforce the ICJ's decisions.

The ratification history concerning the Senate's consent to the UN Charter and to the compulsory jurisdiction of the

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[16] *See Comm. of U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 938 (CADC 1988) (Articles 92 and 94 of the UN Charter "make clear that the purpose of establishing the ICJ was to resolve disputes *between national governments*. We find in these clauses no intent to vest citizens who reside in a UN member nation with authority to enforce an ICJ decision against their own government."); *see also In re Investigation of World Arrangements with Relation to the Prod., Transp., Ref. and Distrib. of Petrol.*, 13 F.R.D. 280, 290-91 (D.D.C. 1952) (refusing to give controlling effect to the ICJ's ruling regarding United Kingdom's ownership of asset).

ICJ also highlights its understanding that ICJ judgments could be enforced only by the Security Council. First, there was clear Executive Branch testimony to this effect:

> "Although parties to cases are obligated to comply with the decisions of the Court, *which is a moral obligation* based on the provisions of the Charter, *there is no provision for the enforcement of such decisions* unless the failure to comply constitutes a threat to the peace or breach of the peace under article 39 of the Charter. There is an article in the Charter (art. 94, par. 2) which provides that *a party may resort to the Security Council* if the other party fails to carry out the judgment and that the Security Council may, *if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment. This Government takes the position that the [Security] Council's action under this article is limited by the scope of its powers as defined in article 39, that is, it must first be determined by the Security Council that the breach constitutes a threat to, or breach of, the peace or an act of aggression."[17]

Moreover, in the debate on acceptance of compulsory jurisdiction, Senator Connally offered an amendment providing that American consent to jurisdiction did not apply to matters within the domestic jurisdiction of the United States as determined by the United States. 92 Cong. Rec. 10,694-95 (1946). Opponents of the Connally Amendment urged that it was unnecessary because the proposed limitation was inherent in the ICJ's jurisdiction and, if the ICJ exceeded its jurisdiction in any case, the judgment could be enforced only in the Security Council, where the United States could exercise a veto.[18] Senator Connally agreed with the opponents

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[17] *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (emphases added).

[18] 92 Cong. Rec. 10,694 (1946) (statement of Senator Pepper) ("The power of effective enforcement lies *only in the Security Council*, and in the

(Continued on following page)

of the amendment concerning the means of enforcing ICJ judgments, but argued for avoiding a situation in which the United States would be forced to exercise its veto. *Id.*, at 10,695 (statement of Sen. Connally). Critically, not a single Senator expressed the view that acceptance of the ICJ's jurisdiction would obligate American courts to enforce its judgments as domestic law, and the entire discussion of the Connally Amendment would make no sense if anyone had had that understanding.

Nor was the Senate's understanding unique; it reflected the understanding of every other signatory nation as well. Indeed, Petitioner and his amici have not pointed to a single nation that has ever inferred from Article 94(1) an obligation on the part of a state's judiciary independently to compel compliance with ICJ decisions. As the D.C. Circuit observed, "the words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'" *Comm. of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 938 (CADC 1988).

Upon ratification, the Senate's understanding was that the UN Charter would provide no domestic enforcement of ICJ decisions. Likewise, the Senate understood the Optional Protocol as providing only diplomatic and political remedies. The Optional Protocol provides,

> "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol to Vienna on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77 (P.A. 138a).

Neither the language, legislative history, nor the application of the Optional Protocol supports the United States's contention that the President may unilaterally render an ICJ

Security Council an effective decision cannot be made to take action against a nation unless there is a unanimity of the Big Five." (emphasis added)).

decision binding in U.S. courts. First, the text of the Protocol contains no language indicating that the ICJ's decisions will be enforceable in the domestic courts of member nations.[19] Such an interpretation would contravene the plain directive of the UN Charter that it is the Security Council, not the domestic courts of member states, that is the "recourse" to enforce ICJ decisions. UN Charter art. 94.

Second, the ratification history concerning this aspect of the Optional Protocol is directly to the contrary. As the State Department explained in testimony before the Senate,

> "[i]f problems should arise regarding the interpretation or application of the [Vienna Convention], such problems would probably be resolved through *diplomatic* channels." S. Exec. Rep. No. 91-9 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (emphasis added).

Indeed, as noted by the United States, U.S. Br., at 29, the *Avena* decision itself does not purport to be privately enforceable of its own force based upon either the Optional Protocol or the UN Charter. Rather, it provides that the United States is obligated "to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the

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[19] Some confusion may be engendered because courts often use the term "self-executing" to refer to two disparate concepts. Its narrowest meaning is whether a particular treaty takes effect upon ratification without requiring a separate implementing statute. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §111(4). Respondent agrees that the Vienna Convention is self-executing in that no implementing legislation was required.

However, the broader (and more relevant) meaning of "self-executing" – whether the terms of a treaty provide for private rights that are enforceable in domestic courts – is a wholly separate question. *See id.*, at §111, cmt. h; *see also United States* v. *Li*, 206 F.3d 56, 68 (CA1 2000) (Selya and Boudin, JJ., concurring) ("That courts sometimes discuss [self-execution in the sense of need for implementing legislation and self-execution as creating individual rights] together . . . does not detract from their distinctiveness. At bottom, the questions remain separate.").

[affected Mexican nationals]." Pet. App. 185a (emphasis added). Thus, even the ICJ in *Avena* did not imagine that its judgment would have direct effect in U.S. courts.

3. The Senate ratified the Vienna Convention with the express understanding that it would not alter domestic law.

The Presidential Memorandum also conflicts with both Congress's and the President's understanding of the effect in domestic law of the Vienna Convention when it was ratified. As the United States has consistently argued, when the Vienna Convention was ratified neither the President nor the Senate understood that it would change domestic law. *See* U.S. Br. in *Medellín I*, at 21-26 (explaining that the Senate ratified the convention based on the Executive Branch's representation that it would not change U.S. law); U.S. Br. in *Sanchez-Llamas*, at 22 (same). This interpretation of the ratification process is confirmed throughout the record of those proceedings, which contains Executive Branch testimony expressly assuring the Senate that the Convention would not alter domestic law:

> "The Vienna Consular Convention does *not have the effect of overcoming Federal or State laws* beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 91-9 (emphasis added).[20]

The Senate Foreign Relations Committee, in turn, explicitly cited as a factor in its endorsement of the treaty that "[t]he *Convention does not change or affect present U.S. laws or practice*." *Id.*, at 2 (emphasis added). And, shortly after ratification, the State Department sent a letter to all 50 governors explaining that the Convention would not require "significant departures from the existing practice within the several states of the United States." *Li*, 206 F.3d, at 64.

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[20] The Department's Senate testimony also emphasized the Vienna Convention's preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." Appendix, S. Exec. Doc. E, 91-1 (1969).

Now, some five decades later, the United States urges an interpretation of the Convention that would not only "affect" U.S. laws, it would require state courts to set aside long-standing state laws of criminal procedure – despite the Senate's express understanding to the contrary.

4. Congress has clearly articulated in the AEDPA its policy preferences regarding the significant deference that should be accorded state criminal judgments.

For decades, Congress has placed significant limitations on federal oversight of state criminal proceedings. The AEDPA represents the most exhaustive articulation of Congress's policy preferences with respect to state criminal convictions, and, for four reasons, the Presidential Memorandum conflicts with those preferences.

First, the AEDPA mandates substantial federal deference to state criminal convictions. *See, e.g.*, 28 U.S.C. §2254(d). As the Court has recognized, there is "no doubt" that the AEDPA was enacted to "further the principles of [federal-state] comity, finality, and federalism," and that it is intended "to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). The Presidential Memorandum fails to reflect that deference and respect for state judgments.

Second, the AEDPA strongly disfavors subsequent habeas applications. *See, e.g.*, 28 U.S.C. §2244(b). In contrast, the Presidential Memorandum mandates that subsequent habeas applications be permitted for all 51 named Mexican nationals.

Third, the AEDPA fixes the source of law that can be applied to upset state court convictions – to "clearly established Federal law, as determined *by the Supreme Court of the United States*." 28 U.S.C. §2254(d)(1) (emphasis added). Thus, on federal habeas, a state conviction cannot be set aside, even pursuant to binding precedent from a federal court of appeals; *a fortiori*, a decision of the ICJ (or a memorandum from the President) is beyond the AEDPA purview for setting aside a final state conviction.

And fourth, the AEDPA prescribes that federal treaty claims receive less exacting habeas scrutiny than do constitutional claims. Specifically, Congress has limited federal habeas appeals to those claims on which a certificate of appealability has issued, 28 U.S.C. §2253(c)(1), and a certificate is available "*only* if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. §2253(c)(2) (emphases added). Thus, Congress's intention was clear: to allow a COA for constitutional claims, but not for claims of statutory or treaty violations. *See Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000) (taking "due note" that in enacting the AEDPA, Congress substituted "constitutional right" for "federal right," which had been the prior standard).[21] Notably, the United States has expressly embraced the view that treaty-based claims such as Medellín's are excluded from AEDPA review. *See* U.S. Br. in *Medellín I*, at 13-15.

To be sure, the AEDPA applies only to federal habeas proceedings, and so the United States could respond that all of these limitations are irrelevant as far as state habeas is concerned. But, these limitations reflect Congress's expressed view on how circumscribed *federal intervention* with state criminal judgments should be, and if the Presidential Memorandum is anything, it is federal intervention. The Presidential Memorandum rejects each of these limits, and does so while claiming congressional acquiescence. Moreover, the Presidential Memorandum purports to require the state courts to conduct a review that, under the AEDPA, the federal courts could not undertake. *See* Part II.B, *infra*.[22]

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[21] "To obtain a COA under §2253(c), a habeas petitioner must make a substantial showing of the denial of a constitutional right. . . ." *Id.*, at 483-84.

[22] There is no doubt that claims raised under the Vienna Convention are subject to the AEDPA's limitations. *Breard*, 523 U.S., at 376 ("Breard's ability to obtain relief based on violations of the Vienna Convention is subject to [the] subsequently enacted [AEDPA], just as any claim arising under the United States Constitution would be.").

C. The Court's Previous Recognition of the President's Independent Authority to Resolve Disputes With Foreign Nations Does Not Support the Assertion of Power in the Presidential Memorandum.

To support the validity of the Presidential Memorandum, the United States relies upon the Court's previous decisions recognizing a limited set of circumstances in which the President may wield independent authority in the field of international relations. *See United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); and *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *see also* U.S. Br., at 12-16.

But these cases do not support the sweeping limitless executive power to resolve disputes with foreign nations proposed by the United States. Rather, in each case the Court's decision turned on Congress's demonstrated acceptance of the asserted presidential authority. *See, e.g.*, *Pink*, 315 U.S., at 227-28; *Dames & Moore*, 453 U.S., at 680-82; *Garamendi*, 539 U.S., at 415. Precisely the opposite is true here. *See* Part I.B, *supra*. The Senate ratified the treaties on the clear understanding that (1) they would not create individual rights, (2) any enforcement of an ICJ decision would be diplomatic or political, not judicial, and (3) they would not affect or alter U.S. law. The Presidential Memorandum contradicts all three prerequisites to Senate ratification, and also runs contrary to the policy preferences expressed by Congress in the AEDPA. Accordingly, because the memorandum lacks any record of congressional acquiescence – indeed, is contrary to the will of Congress – it finds no support in *Dames & Moore* and *Garamendi*, nor in *Pink* and *Belmont*.

As an initial matter, all four cases concerned a narrow subset of cases: civil claims between individuals and foreign governments (or foreign companies). As the Court explained in *Garamendi*,

> "[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799. . . . Given the fact that

> the practice *goes back over 200 years and has received congressional acquiescence throughout its history*, the conclusion '[t]hat the President's control of foreign relations includes the settlement of claims is indisputable.'" *Garamendi*, 539 U.S., at 415 (emphasis added) (quoting *Pink*, 315 U.S., at 240 (Frankfurter, J., concurring), and citing *Belmont*, 301 U.S., at 330-31, and *Dames & Moore*, 453 U.S., at 682).

In *Dames & Moore*, the Court enforced an executive order suspending the claims of American nationals against Iran and subjecting them to binding arbitration in an Iran-United States Claims Tribunal pursuant to a hostage-release agreement with Iran. *Dames & Moore*, 453 U.S., at 686. The Court based its "narrow[]" decision on the ground that claim settlement by executive agreement was a longstanding practice to which Congress had acquiesced. *Id.*, at 678-80, 688. Indeed, the Court stressed that, "[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.*, at 681.

In *Garamendi*, the Court held that a California statute requiring California insurers that sold insurance policies in Europe during the Holocaust to disclose certain information pertaining to those policies was preempted by the President's direct exercise of foreign-affairs authority. *Garamendi*, 539 U.S., at 401. The preemption was specifically based on the President's effort to negotiate a settlement, signed by the President and the Chancellor of Germany, resolving Holocaust-era claims with Germany through the German Foundation Agreement. *Id.*, at 401, 405. In *Garamendi*, as in *Dames & Moore*, the Court focused centrally on centuries of congressional acquiescence to the "particularly longstanding practice" of making executive agreements to settle the claims of American nationals against foreign governments. *Id.*, at 414-15.[23]

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[23] Additionally, one of the acknowledged purposes of the California statute at issue in *Garamendi* was to encourage "the development of a resolution to [Holocaust-era insurance claim] issues *through the international process* . . ." *Id.*, at 410-11 (internal quotation omitted) (emphasis

(Continued on following page)

And likewise, in both *Pink* and *Belmont*, the Court gave effect to an executive agreement with the Soviet Union that assigned all Soviet assets in the United States to the federal government for the purpose of settling outstanding claims between the Soviet government and American citizens. *Belmont*, 301 U.S., at 330; *Pink*, 315 U.S., at 228-30. As with *Dames & Moore* and *Garamendi*, both cases involved the settlement of civil claims against foreign nations, a practice to which Congress has long acquiesced. Moreover, *Pink* and *Belmont* also both implicated the President's authority to recognize and establish diplomatic relations with a foreign nation,[24] a power not at issue in the case at bar.

Thus, each of the cases relied upon by the United States involves an extensive pattern of congressional acquiescence to a narrow category of presidential action. Here, in contrast, there is no history whatsoever of congressional acquiescence to executive action that purports to direct state courts to (1) implement a decision of a foreign tribunal, (2) set aside state law to the contrary, (3) disregard a holding of this Court, and (4) reopen final criminal judgments – all while acknowledging that no treaty or foreign agreement requires such a course of action. Indeed, the very notion of historic congressional acquiescence to presidential action presupposes that there is "precedent" for the act. In this case, however, the United States itself has candidly acknowledged, as it must, that the Presidential Memorandum is "unprecedented."

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added). Thus, *Garamendi* concerned a State passing legislation in order to directly interfere in international affairs, the legitimate province of the national government. *See also Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). In contrast, the Texas criminal procedure statute at issue here is neutral and generally applicable, targeted only to the administration of Texas's criminal justice system and the punishment of crimes committed in Texas against Texans. By no means was it designed to entangle Texas in an international dispute.

[24] *Pink*, 315 U.S., at 229 (describing the "[p]ower to remove such obstacles to full recognition as [the] settlement of claims of our nationals . . . [as] a modest implied power of the President").

D. The Executive Branch's Prior Responses to ICJ Decisions Fail to Show That Congress Has Acquiesced to This Assertion of Presidential Power.

Finally, the United States maintains that a prior history of congressional "acquiescence" to the President's responses to ICJ decisions supports the conclusion that it has likewise acquiesced to the assertion of executive power to respond to *Avena* reflected in the Presidential Memorandum. *See* U.S. Br., at 19-21. But the fact that Congress approved, either expressly or by implication, the President's response to any given ICJ order does not mean Congress has therefore impliedly acquiesced to *any and all* responses to ICJ decisions. And a review of the United States's prior responses, including those cited by the United States, only establishes that the Presidential Memorandum is an "unprecedented" action, with no underpinning of implied congressional approval.

A review of the United States's catalog of prior presidential responses to ICJ decisions, U.S. Br., at 19-21, demonstrates that they bear almost no resemblance to what is attempted through the Presidential Memorandum. First, the United States points to the President's response to the ICJ's decision in *Case Concerning Military and Paramilitary Activities in & Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), that the U.S. owed reparations to Nicaragua for its violation of a bilateral treaty. U.S. Br., at 20. In that case, the President decided that the U.S. would *not* comply with the ruling, and when Nicaragua attempted to raise the issue in the Security Council, the United States vetoed the resolution. *Id.* To say the least, a prior decision to *ignore* an ICJ decision provides little precedent for a President's order that state courts must obey an ICJ decision.[25]

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[25] Indeed, the *Nicaragua* case exemplifies the federal government's understanding that enforcement of ICJ decisions would take place through the Security Council and diplomatic channels.

The United States also relies upon the President's response to provisional measures issued by the ICJ in the *LaGrand* case, which sought to prevent Walter LaGrand's execution. U.S. Br., at 20 (citing 2001 I.C.J. 515-17). There, the Executive Branch concluded that the ICJ's provisional measures in *LaGrand* were not binding of their own force. *See id.* When, as in *Avena*, the ICJ ordered the review and reconsideration of convictions and sentences of German nationals denied consular notification in the future, *id.* (citing 2001 I.C.J. 515-16, ¶128(7)), the President did not issue any order to state courts to comply. Instead, the State Department sent letters to state governors, parole boards, and clemency boards encouraging them to consider the violations of the right to consular notification in cases involving the death penalty. *Id.*, at 20-21. Once again, it is unclear how a prior practice of sending hortatory letters – and, presumably, congressional acquiescence to such epistolary exchange – is somehow "precedent" for a mandatory presidential directive to the state judiciary, purporting to have preemptive force of law.[26]

What is precedential is how the United States has historically treated claims under the Vienna Convention. And,

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[26] The other examples cited by the United States are likewise unpersuasive. *Case Concerning Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27), was never enforced by the U.S. government because it was limited to the legal status of U.S. citizens in Morocco. And the *Gulf of Maine* decision is distinguishable for two reasons. *See Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12). First, that case involved the setting of an international boundary. *See id.* As the Court has recognized, the setting of an international boundary does not necessarily affect boundaries under U.S. domestic law. *See United States* v. *Alaska*, 503 U.S. 569, 588-89 & n.11 (1992). Second, the *Gulf of Maine* decision did not need to be "interpreted" because the boundary dispute was referred to the ICJ pursuant to a narrowly drafted bilateral agreement between the U.S. and Canada that was heavily amended and ratified by the Senate. *See* Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, U.S.-Canada, Nov. 20, 1981, 33 U.S.T. 2797. The Senate cut the boundary issue out of a broader treaty governing fisheries. It is therefore unsurprising that Congress would not second-guess the President's instructions to federal agencies to comply with the new international boundary.

for decades, the State Department has consistently maintained that the Vienna Convention does not create individual rights. In *United States* v. *Li*, the First Circuit posed the question whether the Vienna Convention creates individual rights, and the State Department specifically advised the court that the Convention is a treaty that establishes state-to-state rights and obligations, *not* individual rights. 206 F.3d, at 63 (citing "Department of State Answers to the Questions Posed By the First Circuit in *United States* v. *Nai Fook Li*" "State Department *Li* Answers," at A-1, A-3).

The State Department also addressed the remedies for violations of the consular notification procedures of the Convention: "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* As *Li* noted, the State Department's position on the Convention may be traced to the treaty's inception. The court first pointed to the 1970 letter sent by a State Department legal adviser to the governors of the fifty States, shortly after the Convention's ratification, advising that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the United States." *Id.*, at 64.

Likewise, *Li* also pointed to the State Department's written submission to the Inter-American Court of Human Rights in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification – the precise issue raised in this case. The Department's submission unequivocally stated that the Vienna Convention "*does not require the domestic courts of State parties to take any actions in criminal proceedings*, either to give effect to its provisions or to remedy their alleged violation." *Id.* (emphasis added). The *Li* court thus correctly concluded that "the Department has denied the availability of criminal remedies for failures of consular notification." *Id.*

That is the United States's position to which there is a decades-long pattern of congressional acquiescence. And that is the position that the United States abruptly changed with the issuance of the Presidential Memorandum.

The magnitude of the change is best illustrated by the United States's response to the *Breard* case, which – tellingly – is omitted from the catalog of Executive Branch responses to the ICJ. *See* U.S. Br., at 19-21. In that case, Angel Francisco Breard, a Paraguayan national sentenced to death in Virginia, raised a claim under the Vienna Convention. *Breard*, 523 U.S., at 373. After American courts held that any claims Breard had under the Vienna Convention were procedurally defaulted, Paraguay instituted proceedings against the United States in the ICJ. *Id.*, at 373-74. The ICJ subsequently issued an order that the United States "take all measures at its disposal to ensure that [Breard] is not executed pending the final decision in [the ICJ's] proceedings." *Id.*, at 374.

The Executive Branch's response to the ICJ's *Breard* order was much like that in *LaGrand*: "The Executive Branch . . . in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay." *Id.*, at 378. The President also responded to the *Breard* order, as in *LaGrand*, by having the Secretary of State "[send] a letter to the Governor of Virginia requesting that he stay Breard's execution." *Id.*

And, to remove all doubt as to its view of the President's authority, the United States expressly advised this Court:

> "Our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. *The measures at [the United States'] disposal under our Constitution may in some cases include* ***only persuasion*** – such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution – and not legal compulsion through the judicial system. ***That is the situation here.***" Brief for the United States as Amicus Curiae in *Breard*, at 51 (emphases added, brackets in the original, and quotations omitted).

Thus, in 1998, it was the explicit position of the United States that, "under our Constitution," the "only" measure available for the Executive to respond to an order

from the ICJ was "persuasion" – other than that, the President had no "ability to interfere with the criminal justice systems of the States." *Id.*

II. THE PRESIDENTIAL MEMORANDUM IMPERMISSIBLY INTRUDES ON THE AUTHORITY OF THE JUDICIARY.

A. The Presidential Memorandum Impermissibly Intrudes on the Authority of This Court.

This case is controlled by *Sanchez-Llamas*. Just last Term, the Court decided the questions raised by Petitioner, to wit:

- The Court held that, "[a]lthough the ICJ's interpretation deserves 'respectful consideration,' we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*." 126 S.Ct., at 2683 (internal citation omitted).
- The Court held that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts," and that the UN Charter's "procedure for noncompliance – referral to the Security Council by the aggrieved state – contemplates quintessentially *international* remedies." *Id.*, at 2684-85 (emphasis in the original).
- And, therefore, the Court expressly concluded, "as [it] did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." *Id.*, at 2687.

Indeed, the Court went one step further, and answered the precise question raised by Petitioner: whether he can be barred from filing a successive habeas petition raising his claim under *Avena*. The Court was unequivocal:

> "If the State's failure to inform the defendant of his Article 36 rights generally excuses the defendants' failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and *prohibitions against filing successive habeas petitions* must also yield in the face of Article 36 claims.

> *This sweeps too broadly*, for it reads the 'full effect' proviso in a way that leaves little room for Article 36's clear instruction that Article 36 rights 'shall be exercised in conformity with the laws and regulations of the receiving State.'" 126 S.Ct., at 2686 (quoting Article 36) (emphases added).

Given the Court's explicit holdings in *Sanchez-Llamas*, resolution of this case should be simple. Medellín argues, however, that his case is different, because he was expressly named in *Avena*. Pet'r Br. 21-22. That claim to *res judicata* is unpersasive. *See* Part VII, *infra*. The United States, however, has a different argument.

The United States argues that the Texas court should not follow *Sanchez-Llamas*. Instead, the United States urges, the Presidential Memorandum should provide the governing rule.

It is beyond peradventure that the President cannot overrule the Supreme Court as to "what the law is." Yet that is the import of the United States's argument. Although the memorandum predated *Sanchez-Llamas* (and post-dated *Breard*), the United States argues that it, and not this Court's decision, should govern the state court's analysis. Such a contention is irreconcilable with this Court's Article III role as expositor of federal law. *See generally* Amicus Br. of Former Senior Department of Justice Officials.

Nor is the United States's theory saved by the notion that the memorandum was drafted in response to the international law obligation created by the *Avena* decision. In *Sanchez-Llamas*, Petitioners' amici urged that, because the ICJ had "interpreted the Vienna Convention to preclude application of procedural default rules to Article 36 claims," the United States was "*obligated* to comply with the Convention, *as interpreted by the ICJ*." 126 S.Ct., at 2683 (emphases in the original). The Court, in turn, squarely rejected that contention. *Id.*

The *Sanchez-Llamas* decision itself refutes the United States's argument. As the Court explained, "[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is

emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." *Id.* (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). And the Court concluded that it was "against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ." *Id.*

Simply put, only the Supreme Court – not the President and not the ICJ – can determine whether the Vienna Convention, the Optional Protocol, or any other federal law requires the displacement of state procedural-default doctrines or state successive habeas prohibitions. And for the United States to assert otherwise is to intrude impermissibly into the constitutional obligations of Article III courts.

B. The Presidential Memorandum Also Impermissibly Intrudes on the Authority of the State Judiciary.

The United States urged, in *Sanchez-Llamas*, that "'it is beyond dispute that [this Court] do[es] not hold a supervisory power over the courts of the several States.'" U.S. Br. in *Sanchez-Llamas*, at 33 (quoting *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000)). The Court expressly agreed:

> "We . . . agree with . . . Oregon and the United States that our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself." 126 S.Ct., at 2679.

The United States's argument was not without irony, in that the "authority to create a judicial remedy applicable in state courts" is precisely what the President is now claiming. And *Sanchez-Llamas* further made clear that the treaty provides no such mandate:

> "Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly *little reason to think that such interpretations were intended to be controlling on our courts*." *Id.*, at 2684 (second emphasis added).

For the same reason that this Court lacks general "supervisory power over the courts of the several States," so too (even more so) does the President. Yet that is in effect what the United States is asserting. And although the claimed authority is limited to the state courts, the United States nowhere explains why it could not just as well apply to the federal courts. And, as Justice Ginsburg noted,

> "it would be unseemly, to say the least, for this Court to command state courts to relax their identical, or even less stringent procedural default rules, while federal courts operate without constraint in this regard." 126 S.Ct., at 2689 (Ginsburg, J., concurring in the judgment).

Additionally, the United States claims the remarkable power to order the state courts to reopen final judgments and decide cases differently. In the instant case, Petitioner has already, on first state habeas, presented his Vienna Convention claim to the Texas Court of Criminal Appeals, and the Texas court has rejected that claim as procedurally barred. The ICJ disapproved of that decision, and, accordingly, so did the President. Therefore, the Presidential Memorandum provides that the Texas court should go back and reconsider the claim it has already rejected, this time without relying on its previous grounds for decision.

Such a power of executive revision of judicial decisions is wholly outside the President's authority. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). It is well-established that the political branches of government may not "'prescribe rules of decision to the Judicial Department . . . in cases pending before it.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quoting *United States* v. *Klein*, 13 Wall. 128, 146 (1872)); *see also Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992). *See generally* Amicus Br. of Constitutional Law Scholars. Yet that is what the United States is attempting to do.

Not only does the Presidential Memorandum direct state courts to revisit claims previously rejected, it orders those courts to discover jurisdiction where none previously existed. In the words of Judge Keasler's plurality, the memorandum improperly intrudes into the independent power of

the judiciary by attempting to "dictate to the judiciary . . . how to interpret the applicable law." Pet. App. 30a.

Moreover, as the Court explained in *Alden* v. *Maine*, Congress (and, *a fortiori*, the President) cannot force the state courts to do anything that it could not direct the federal courts to carry out:

> "It would be an *unprecedented step* . . . to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that *Congress' authority to pursue federal objectives through the state judiciaries exceeds* not only its power to press other branches of the State into its service but even *its control over the federal courts themselves*. The conclusion would imply that Congress may in some cases act only through instrumentalities of the States. Yet, as Chief Justice Marshall explained: 'No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.'" 527 U.S. 706, 752 (1996) (emphases added) (quoting *M'Culloch* v. *Maryland*, 4 Wheat. 316, 424 (1819)).

The President surely could not direct a federal district court or this Court to discover jurisdiction where none previously existed, and neither can he constitutionally direct the state courts to do the same.

III. THE PRESIDENTIAL MEMORANDUM IMPERMISSIBLY INTRUDES ON THE AUTHORITY OF THE STATES.

The Presidential Memorandum also impermissibly attempts to assert federal power over the States in a manner prohibited by the Constitution. Even the federal government acting as a whole may not alter the structure of state government or commandeer the state judiciary in order to implement federal policy. Yet these are the results contemplated by the memorandum, which purports to expand the jurisdiction of

Texas courts so that they may provide further review of Medellín's case.

As the Court has explained:

> "The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. . . . Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of the 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and federal Governments would exercise concurrent authority over the people.'" *Alden*, 527 U.S., at 714 (quoting *Printz*, 521 U.S., at 919-20).

Thus, the constitutional structure preserves state sovereignty by (1) securing the States' authority as sovereigns to "order the processes of [their] own governance," *id.*, at 752, and (2) prohibiting the federal government from treating the States as "mere political subdivisions of the United States," commandeering the machinery of state government to implement federal policy, *New York*, 505 U.S., at 188.

The Presidential Memorandum contravenes both of these protections of state sovereignty. *See generally* Amicus Br. of Virginia, 27 Other States, and Puerto Rico.

A. The Presidential Memorandum Impermissibly Seeks to Alter the Structure of the Texas Judiciary in Order to Implement *Avena*.

Under our federal system, "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). The Court aptly summarized this fundamental principle in *United States* v. *Morrison*, 529 U.S. 598 (2000): "Indeed, we can think of no better example of the police power, which the Founders denied the National

Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.*, at 618.

Similarly, the States have broad sovereign authority over their own judicial processes, including state-law habeas procedures. Thus, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [the Court] must act with utmost caution before deciding that it is obligated to entertain the claim." *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990). As the Court explained, "[t]he general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' *The States thus have great latitude to establish the structure and jurisdiction of their own courts.*" *Id.* (emphasis added and citations omitted).[27]

Article 11.071 of the Texas Code of Criminal Procedure governs the jurisdiction of Texas courts to consider the merits of subsequent applications for state habeas relief filed in a death penalty case. *See Ex parte Graves*, 70 S.W.3d 103, 115 (Tex. Crim. App. 2002). Applying the text of Article 11.071, the Texas Court of Criminal Appeals determined that Texas courts lack jurisdiction to provide Medellín further habeas review.

Medellín and the United States assert that the Presidential Memorandum nonetheless requires Texas courts to provide review and reconsideration of Medellín's case, displacing Article 11.071 and creating previously nonexistent state-habeas jurisdiction. But neither the President's foreign-affairs powers under Article II nor the Supremacy Clause can support an attempt to force Texas to enlarge the jurisdiction of its courts. *See De Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890) (noting that the "treaty power" shall not "authorize what the constitution forbids[] or a change in the character of the government[] or in that of one of the states").

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[27] The States' discretion as sovereigns to prescribe their judicial processes is a particularly strong consideration when the State is not required to provide *any* access to the courts, as is the case with habeas corpus. *See Pennsylvania* v. *Finley*, 481 U.S. 551, 556-57 (1987) ("States have no obligation to provide [postconviction] relief.").

This bedrock principle was restated in *Erie R.R. Co.* v. *Tompkins*: "The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments." 304 U.S. 64, 78 (1938). In short, the Court has made it "quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson* v. *Fankell*, 520 U.S. 911, 922 n.13 (1997).

B. The Presidential Memorandum Also Contravenes the Anticommandeering Doctrine Because it Conscripts State Courts to Implement a Federal Obligation.

The Court has recognized that, in order to protect the States' residual sovereignty, the Framers rejected a system under which the States would have operated as the instruments of the federal government in favor of "'a Constitution that confers upon Congress the power to regulate individuals, not States.'" *Printz*, 521 U.S., at 920 (quoting *New York* v. *United States*, 505 U.S. 144, 166 (1992)). Accordingly, the Constitution does not permit the federal government to require States to pass legislation according to its instructions. *See New York*, 505 U.S., at 162. Rather, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S., at 928.

These principles animate the anticommandeering doctrine that the Court recognized in *New York* and *Printz*. *Id.*, at 925-26; *New York*, 505 U.S., at 175-77. Although the Court has only had occasion to apply the anticommandeering doctrine to the legislative and executive branches of state government, its principles are equally applicable here. The state judiciary, like the state legislature or executive, is an independent and co-equal branch of state government. And like the state legislative and executive branches, the state judiciary is neither a "regional office[ ]" nor an "administrative agenc[y] of the Federal Government," and the state courts "appear nowhere on the Federal Government's most detailed organizational chart." *New York*, 505 U.S., at 188. Nor does the state judiciary warrant any

less protection from outside sovereigns: as the Court has recognized, a state's allocation of the "separate duties of the judicial and political branches of the state government[]" goes "to the heart of representative government." *Alden*, 527 U.S., at 751 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991)).

Medellín argues that *Testa* v. *Katt*, 330 U.S. 386 (1947), authorizes the commandeering of the state judiciary, Pet'r Br., at 32, but *Testa* does no such thing. At issue in *Testa* was simply whether Congress may "pass laws enforceable in state courts." *New York*, 505 U.S., at 178. In concluding that federal law is enforceable in state court, the Court did not reason that the federal government may conscript the state judiciary as such – and it certainly did not conclude that the federal government may control the *jurisdiction* of state courts. To the contrary, the Court recognized only that "[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett*, 496 U.S., at 367; *Testa*, 330 U.S., at 392. Because the *body of law* applicable in state court includes federal law – and hence "'[t]he two together form one system of jurisprudence, which constitutes the law of the land for the state,'" *Mondou* v. *New York, N. H. & H. R.R. Co.*, 223 U.S. 1, 58 (1912) – a state court with "jurisdiction adequate and appropriate *under established local law*" must adjudicate federal actions, *Testa*, 330 U.S., at 394 (emphasis added).

Testa and its progeny "all involve congressional regulation *of individuals*, not congressional requirements that States regulate." *New York*, 505 U.S., at 178 (emphasis added). The Court has thus noted, "as a matter of some significance, that Congress had not attempted [in these cases] 'to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure.'" *Howlett*, 496 U.S., at 373 (quoting *Mondou*, 223 U.S., at 56, 57).

IV. THE ARGUMENTS PRESENTED BY THE UNITED STATES IN SUPPORT OF THE PRESIDENTIAL MEMORANDUM DO NOT READILY ADMIT ANY WORKABLE LIMITING PRINCIPLE.

If the United States were to prevail with its broad theories in support of the "unprecedented" Presidential Memorandum, that precedent could, in turn, open the door to a host of potential abuses from future Presidents. The core of the United States's argument proceeds as follows: (1) the Senate has ratified treaties giving the ICJ authority to adjudicate disputes, (2) the ICJ's decision in *Avena* is a binding obligation on the United States, (3) although *Avena* would ordinarily have no domestic legal application, because the President is preeminent in foreign affairs he can choose the appropriate means to satisfy the obligation of *Avena*, (4) because the obligation originates from treaties, his choice of means is federal law at the zenith of his *Youngstown* authority, and so (5) he may conscript state courts and set aside any conflicting state laws. And all of this, it is to be remembered, is *after* this Court has expressly held that the underlying treaties require no "review and reconsideration" whatsoever.

Under those theories, whenever the President could locate an extant obligation in international law, grounded in some general treaty commitment, the President would have at least an arguable basis to set aside any state laws to the contrary. Given the multiple broad and specific treaty commitments of the United States – many non-self-executing, like the Optional Protocol – the predicate is laid for potentially far-reaching preemptive presidential power.

Moreover, the theories advocated by the United States do not readily admit a workable limiting principle. For example, under those same theories, little would prevent a President:

1. from ordering federal district courts to "review and reconsider" final federal habeas determinations, notwithstanding the AEDPA;
2. from ordering *this Court* to "review and reconsider" its holding in *Sanchez-Llamas*;

3. from ordering state or federal courts to annul all 51 convictions and sentences; or

4. from ordering the governors of the respective States to grant full pardons to all 51 convicted murderers.[28]

The United States would no doubt respond, with respect to the first two examples above, that the Supremacy Clause does not preempt federal law the way it does state law. But the United States's theory is that the Presidential Memorandum is a new manifestation of federal law, and so the United States could urge that it, too, is binding on the federal courts (much as the argument is made in the instant case that *this* Court should apply the Presidential Memorandum, and not *Sanchez-Llamas*). And, while the second two examples may seem somewhat attenuated, it bears emphasis that Mexico expressly sought from the ICJ "annulment" of the convictions in *Avena*. *See* Pet. App. 163a. Had the ICJ obliged, it is difficult to perceive – in the theories advanced by the United States – why the third or fourth examples above would not be equally suitable means for carrying out that ICJ order.

The United States could also be heard to answer that the claimed authority extends only to instances where there is a mandatory judgment against the United States from an international tribunal. But nothing in the arguments put forth by the United States turns on a prior adjudication. Instead, the argument is that (1) there is an extant international law obligation on the United States, and so (2) the President may act to effectuate that obligation. That same justification could apply to other existing treaty obligations as well. For example, the International Convention on Civil and Political Rights, 6 I.L.M. 368 (1967) (entered into force Sept. 8, 1992), has numerous broad provisions that can be characterized as current treaty obligations of the United

[28] This would of course be in circumvention of the limitation of the Article II, section 2, pardon power to *federal* offenses, but it would still arguably be a logical extension of the United States's argument.

States.[29] Under the justifications advanced in this case, the President would arguably have the authority to make those obligations self-executing and to set aside any state laws deemed to conflict with those obligations, all without ever securing congressional agreement.[30]

And these examples do not even begin to chronicle the host of state laws – environmental laws, tort laws, consumer protection laws, marriage laws, adoption laws, laws providing for capital punishment – that a future President could possibly deem in conflict with treaty obligations and could therefore attempt to unilaterally set aside "in accordance with general principles of comity." Pet. App. 187a.

For that very reason – to limit unchecked unilateral power – our constitutional system typically requires interbranch cooperation before setting aside laws adopted by democratically-elected state legislatures. As then-Justice Rehnquist observed for the Court in *Dames & Moore*,

> "'The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.'" 453 U.S., at 662 (quoting *Youngstown*, 343 U.S., at 641 (Jackson, J., concurring)).

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[29] *See, e.g.*, Article 1, ¶1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); Article 6, ¶4 ("Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.").

[30] Although the Senate entered reservations limiting the rights conferred to the scope provided by the U.S. Constitution and indicating that those provisions were not self-executing, S. EXEC. REP. No. 102-23, at 1 (1992), those were the very same implied understandings under which the Senate ratified the Vienna Convention and the Optional Protocol, see Part I.B, *supra*.

V. THE EXECUTIVE BRANCH, COORDINATING WITH EITHER CONGRESS OR THE STATES, CAN COMPLY WITH *AVENA*.

Nobody disputes that the United States has an international law obligation to satisfy *Avena*. Should the President choose to comply with that obligation, there are constitutional avenues available. But, to change domestic law, the President must first coordinate with Congress or the States.

For example, the President could coordinate with Congress to provide a statutory federal habeas remedy – likely an exception to the AEDPA's prerequisites for federal habeas review – that would apply to the 51 Mexican nationals affected by *Avena* and that would provide further judicial review of their cases consistent with *Avena*. Although that would not necessarily be free of all constitutional challenge, such a remedy would at a minimum be backed by the full authority of the federal government at its zenith.

Likewise, further review of these 51 cases might also be achieved by means of a treaty with Mexico, duly ratified by the Senate, which contained a provision expressly incorporating *Avena*'s requirement for further federal judicial review of these cases and which denominated such provision as self-executing federal law. This, too, would employ the full force of the national government's authority.

Alternatively, as Texas expressly urged the Department of Justice, the Executive Branch could choose to work directly with the States to comply with *Avena*. Specifically, the President could issue an Executive Order to provide an executive "review and reconsideration" panel for the 51 Mexican nationals referenced in *Avena*, consisting of, for example, retired federal judges appointed by the Attorney General.[31] And, in any instances in which the executive

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[31] Although *Avena* specified that any review and reconsideration must occur within the judiciary, Pet. App. 165a, 174a, it also left the means to the United States's choosing, Pet. App. 185a. This approach, while perhaps not perfect compliance, would go considerably further than simply refusing to comply (the course chosen in the Nicaragua case) and would be unquestionably constitutional.

review panel found actual prejudice, the Attorney General could then convey that fact to the state pardon and parole authorities, along with the President's request that that demonstration be given great weight in state clemency proceedings.[32]

Any of these paths would allow the President to comply with the United States's international obligations under *Avena* while respecting the Constitution's limits on his authority.

VI. BECAUSE THE PRESIDENTIAL MEMORANDUM RAISES PROFOUND CONSTITUTIONAL QUESTIONS, THE COURT SHOULD CONSTRUE IT ACCORDING TO ITS PLAIN TEXT – AS A REQUEST, NOT A COMMAND.

Under longstanding principles, the Court "will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *United States* v. *Lopez*, 514 U.S. 549, 562 (1995); *see also N.L.R.B.* v. *Bishop of Chicago*, 440 U.S. 490, 500 (1979). Construing the Presidential Memorandum as a binding order raises profound questions of separation of powers and federalism.

Yet the plain text of the memorandum admits another construction. The memorandum is a two-paragraph missive to a single member of the Cabinet. It is not published in the Federal Register, and it bears none of the indicia of an Executive Order. It is not addressed to the States and not phrased in directive language. Indeed, it invokes comity, an inherently discretionary doctrine. Accordingly, to avoid constitutional doubt, the Court should treat it as a request, and not a command.

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[32] Many states, including Texas, would likely be willing to agree beforehand to accord considerable weight to any such executive findings of prejudice.

VII. *AVENA* IS NOT A BINDING JUDGMENT ENFORCEABLE BY A PRIVATE PARTY IN A DOMESTIC COURT.

Medellín asserts that the *Avena* decision is binding federal law of its own force, and that it is likewise enforceable by a private party in domestic courts. Pet'r Br., at 26-27. Medellín's argument is fatally flawed for three reasons. First, as the Court concluded in *Sanchez-Llamas* last Term, under Article III of the Constitution it is for this Court to interpret treaties as a matter of federal law, and this Court has already definitively rejected Medellín's interpretation of the treaty. *Sanchez-Llamas*, 126 S.Ct., at 2683-85. Medellín is not entitled to a different adjudication in Texas state court merely because he was mentioned by name in *Avena*.[33] He was not a party to *Avena* (nor could he have been), and so cannot claim *res judicata*; only nations were parties to *Avena*. And, under *Sanchez-Llamas*, the Texas Court of Criminal Appeals was obliged to reject his claim.

Second, nothing in the structure or purpose of the ICJ supports Medellín's conclusion that its decisions are self-executing federal law enforceable by a private party. To the contrary, the ICJ is designed to resolve disputes between nations as a matter of international law, and its decisions are enforceable only through the Security Council of the United Nations. *See* Part I.B.2, *supra*.

Finally, Medellín's assertion that *Avena* is privately enforceable of its own force is untenable because it improperly transfers to the courts the authority of the Executive and Legislative branches to determine whether non-compliance with *Avena* is appropriate, as well as how to comply if the political branches decide compliance is the correct response. For this reason, the United States has urged that *Avena* is not privately enforceable, *see* U.S. Br., at 27-29, and that determination is entitled to great deference,

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[33] The decision by its terms also does not limit itself to the Mexican nationals made the basis of the proceedings in the ICJ, but rather expressly states that it applies to all "similarly situated" foreign nationals in the United States. *See* Pet. App. 181a.

Sumitomo Shoji Am., Inc. v. *Avagliano*, 457 U.S. 176, 184-85 (1982).

VIII. MEDELLÍN HAS ALREADY RECEIVED THE JUDICIAL REVIEW PRESCRIBED BY *AVENA*.

All of Medellín's contentions are premised on the supposition that the ICJ's *Avena* decision has not been "given effect" as to Medellín, meaning that he has never received an assessment of whether the Vienna Convention violation caused him actual prejudice. But Medellín received the "actual prejudice" review prescribed by *Avena* when his first application for state habeas corpus relief was adjudicated. For that reason, Texas has already "given effect" to *Avena* in Medellín's case, and the questions of executive power and the enforceability of ICJ decisions in domestic courts are moot.

In its findings of fact and conclusions of law concerning Medellín's First Application, the state trial court rejected his Vienna Convention claim on several alternative grounds. *See Medellín I* Pet. App. 55a-57a. One of those alternative holdings, consistent with the ICJ's subsequent decision in *Avena*, addressed whether Medellín had established that the violation actually caused his conviction or punishment:

> "The applicant fails to show that his rights, pursuant to U.S. Const. amends. V, VI, and XIV, were violated and *fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Medellín I* Pet. App. 57a (emphasis added).

The trial court also concluded that [redacted]ail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellín] was provided with effective legal representation upon [his] request; and [his] constitutional rights were

safeguarded." *Id.*, at 56a. The Texas Court of Criminal Appeals agreed. *Id.*, at 32a-33a.

These alternative merits holdings establish that Texas courts have already provided the "actual prejudice" review prescribed by *Avena* in resolving his First Application for state habeas relief.

Because Texas already provided the review that *Avena* prescribed, the questions presented are moot. This Court, like all federal courts, lacks jurisdiction to decide moot cases because its constitutional authority extends only to actual cases or controversies. *See Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam).

CONCLUSION

The Court should affirm the judgment of the Texas Court of Criminal Appeals. Alternatively, because Texas courts have already provided the review prescribed by *Avena*, the questions presented are moot, and the writ of certiorari should be dismissed for want of jurisdiction.

Respectfully submitted,

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August 2007

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(22)

No. 06-984

FILED

AUG 23 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

APPENDIX TO BRIEF FOR RESPONDENT

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MANDATE FROM
COURT OF CRIMINAL APPEALS
Austin, Texas

THE STATE OF TEXAS,
TO THE 339TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY – GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 30th day of April A.D. 1997 the cause upon appeal to revise or reverse your Judgment between

JOSE ERNESTO MEDELLIN,

– VS. –

THE STATE OF TEXAS,

CCRA No. 71,997
Tr. Ct. No. 675430

was determined: and therein our said COURT OF CRIMINAL APPEALS made it's order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that the appellant pay all costs in this behalf expended, and that this Decision be certified below for observance."

The Appellant's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf

and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE MICHAEL J. MCCORMICK, Presiding Judge

of our said **COURT OF CRIMINAL APPEALS**, with the Seal thereof annexed, at the City of Austin, this 16th day of May A.D. 1997.

TROY C. BENNETT, JR., Clerk
BELVA MYLER, Deputy Clerk

Appeal from HARRIS County
No. 71,997

JOSE ERNESTO MEDELLIN,

Appellant

– v. –

THE STATE OF TEXAS,

Appellee

OPINION

Appellant, Jose Ernesto Medellin, was convicted in September of 1994 of a capital murder committed in June of 1993. TEX. PENAL CODE ANN. §19.03(a)(2). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure art. 37.071 §§ 2(b) and 2-(e), the trial judge sentenced appellant to death.[1] Article 37.071 § 2(g). Direct appeal is automatic. Article 37.071 § 2(h). We will affirm.

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[1] Any subsequent references to Articles are to those in the Texas Code of Criminal Procedure unless otherwise indicated.

Appellant raises nine points of error, including challenges to the sufficiency of the, evidence at both stages of trial. In his first point of error, appellant asserts that this cause should be abated and remanded to the trial court for the trial judge to enter written findings of fact and conclusions of law regarding the outcome of a hearing on the voluntariness of appellant's confession as required by Article 38.22 § 6 of the Texas Code of Criminal Procedure. Because this has been done, appellant's first point of error is now moot.[2]

A recitation of the facts will be helpful in addressing the remaining points of error. Looking at the evidence in the light most favorable to the jury's verdict, the record reveals the following facts: On the night of June 24, 1993, a gang called the "Black and Whites" had come together to initiate a new member, Raul Villareal. The other gang members present were appellant, Peter Cantu, Roman Sandoval, Efrain Perez, and Sean O'Brien. Roman's brother, Frank, and appellant's fourteen-year-old brother, Venancio, were also tagging along. The initiation involved fighting each member of the gang for a five to ten minute period. After the fighting was over, Raul was welcomed into the gang.

Meanwhile, fourteen-year-old Jennifer Ertman and sixteen-year old Elizabeth Pena were visiting a girl-friend. Around 11:15 p.m., Jennifer and Elizabeth decided to head for their respective homes by way of a shortcut across the

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[2] This cause was abated on May 8, 1996, pursuant to Tex. R. App. Proc. 40(b)(2). *See Green v. State*, 906 S.W.2d 937 (Tex. Crim. App. 1995). The requested findings of fact and conclusions of law were thereafter forwarded to this Court. The trial court having complied with our order, we now continue the appeal of this cause.

railroad tracks. Jennifer and Elizabeth first encountered Roman and Frank as they made their way home, but managed to pass the brothers without incident. However, as they passed appellant, he attempted to engage Elizabeth in conversation. When Elizabeth tried to run from appellant, he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but Peter and Sean grabbed her and threw her down as well. At this point, the Sandoval brothers decided that it was time to leave.

Subsequent boastful statements of appellant and other gang members revealed that what ensued was a brutal gang rape of both of the girls. After the girls were thrown to the ground, the gang members orally, vaginally, and anally raped both of them. After the assault, appellant, Raul, Efrain, and Peter regrouped at Peter's house where he lived with his brother and sister-in-law, Joe and Christina Çantu, to brag about their exploits. Christina noticed that Raul was bleeding and that Efrain had blood on his shirt. She asked the group what had occurred and appellant responded that they "had fun" and that their exploits would be seen on the television news. Appellant was hyper, giggling, and laughing. He boasted to Joe and Christina that the group had met two "hos" [sic] and had sex with them. He also told the couple that two girls had been talking to them and that he punched one of the girls because she had started screaming after he grabbed her.

Appellant related to Joe and Christina that he sexually assaulted one of the girls and bragged about having "opened" her since she had apparently been a virgin. As if to accentuate his conquest, appellant showed Christina his blood soaked underwear. Appellant related that after

another gang member sexually assaulted the second girl, he "turned her around" and anally raped her. Appellant also bragged of having forced both girls to engage in oral sex with him. Peter joined the group shortly thereafter and began to divide up the money and jewelry that had been taken from the two girls. Peter gave appellant a ring with an "E" design on it so that he could give it to his girlfriend, Esther.

When Christina asked the group what happened to the girls, appellant told her that they had been killed so that they could not identify their attackers. Appellant then elaborated that it would have been easier with a gun, but because they did not have one at the scene of the incident, he took off one of his shoelaces and strangled at least one of the girls with it.[3] Both Joe and Christina noted that appellant complained of the difficulty group encountered in killing the girls. After appellant related the difficulty he encountered in strangling one of the girls, he said that he put his foot on her throat because she would not die.

Christina subsequently convinced her husband to report the incident to the police. By the time the bodies were discovered, they were so badly decomposed that dental records were required to identify them. However, enough tissue remained for the medical examiner to

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[3] Apparently all of the gang members were talking about having killed the two girls which resulted in some degree of confusion on the part of the witnesses. However, Christina testified that she understood appellant to have said that he personally participated in killing both of the girls, while Joe testified that he understood appellant to have said that he strangled one of the girls while his companions killed the other girl.

determine that each girl had died of a trauma to the neck consistent with strangulation.

Eventually, all of the individuals who participated in the rapes and murders were apprehended. After appellant was arrested, he gave a written and then an oral, taperecorded statement, the latter of which was never offered into evidence at trial. In the written statement, appellant admitted to having had oral sex with Elizabeth, but commented that he only peripherally participated in her murder.

At the punishment stage of trial, appellant's parents testified that appellant had been a good student and had made good grades until he entered the sixth grade. After that point, appellant's behavior deteriorated rapidly. Appellant was suspended from middle school in the Fall of 1990 for "misconduct and repeated misbehavior." In high school, appellant was well known to administrators due to his repeated disciplinary violations. In January of 1992, appellant was restrained by an assistant principal from attacking another student. Furthermore, appellant repeatedly threatened to kill the assistant principal and to "fix it" so that he could not father any more children. Appellant told the assistant principal that life meant nothing to him. (appellant) and that someday he would be featured on television or the front page of the newspaper as the result of having killed someone, "probably a cop." In October of 1992, appellant was involved in a gang related fight at school which resulted in his expulsion from school and subsequent placement at an alternative school.

Appellant was also known to the police. In January of 1992, police were called to a restaurant in response to a disturbance call involving a terroristic threat. When

initially confronted by police, appellant refused to stop or to remove his hand from his pocket. He was later found to have a .38 caliber pistol concealed in his pocket. In June of 1993, appellant was found at the emergency room of a Houston hospital where Efrain Perez was being treated for a gunshot wound. Testimony from an employee of the hospital regarding a conversation the employee overheard between appellant and co-defendant Cantu indicated that the two knew who had shot Perez and that they were going to go after that individual themselves. When a police officer arrived to investigate the shooting, appellant was belligerent and uncooperative.

While appellant was in jail awaiting trial on the instant offense, a search of appellant's cell turned up a "shank"[4] which had been fashioned from a disposable razor. Another search of appellant's cell a year later, the day before punishment arguments were to be heard in the instant case, turned up another "shank" in the making.

I. SUFFICIENCY OF THE EVIDENCE

Appellant asserts in his sixth point of error that the evidence was legally insufficient to support the jury's guilty verdict. In reviewing the sufficiency, of the evidence, this Court reviews all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Appellant concedes that sufficient evidence exists to prove his participation in the underlying

---

[4] A "shank" was described as a type of homemade or jailmade knife.

offenses to the capital murder. However, appellant takes issue with the sufficiency of the evidence to prove his specific intent to commit the offense of murder. He contends the evidence supporting this intent, the testimony of Joe and Christina Cantu, was more accurately attributable to appellant's co-defendants than to appellant.

A review of the testimony of both Christina and Joe Cantu shows that they did indeed attribute many statements about the deaths of the two victims to the generic "they" encompassing the whole group. However, each witness also testified to statements attributed only to appellant. Specifically, Christina testified that appellant told her he killed the victims. In fact, she stated that appellant said that he took turns killing both of the girls.

Christina commented that appellant told her that "he took off his shoelace and strangled one of the girls."

Christina also told the jury that appellant related to her that he put his foot on one of the girl's throats, and she testified that appellant "said it would have been faster if he had a gun to kill them." When Joe Cantu was asked if he remembered specifically what appellant told him about the killing, Joe responded that appellant had told him that appellant strangled one of the victims from the back and when she didn't look like she was dead, he started stomping on her. Joe also testified that appellant commented that it would have been easier with a gun.

Given the totality of the evidence, we hold that a rational trier of fact could have found appellant guilty of the offense of capital murder beyond a reasonable doubt. Point of error number six is overruled.

In his seventh point of error, appellant posits that the evidence was insufficient to support the jury's affirmative answer to the issue on whether appellant would be a continuing danger. Article 37.071 § 2(b)(1). In reviewing whether the evidence is sufficient to support the jury's affirmative finding on the issue of future dangerousness, this Court looks at the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have believed beyond a reasonable doubt that "there is a probability that [appellant] would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071 § 2(b)(1); *Jackson v. Virginia,* 443 U.S. 307 (1979); *Allridge v. State*, 850 S.W.2d 471 (Tex. Crim. App. 1991), *cert. denied*, ___ U.S. ___, 114 S.Ct. 101 (1993). The facts of the crime alone can be sufficient to support the affirmative finding to the special issue. *Allridge, supra.* In fact, the circumstances of the crime may provide greater probative evidence of a defendant's probability for committing future acts of violence than any other factor relevant to the second special issue. *Id.*

At trial, the jury is – permitted to look at several factors in its review of future dangerousness including, but not limited to:

1. the circumstances of the capital offense, including the defendant's state of mind and whether he was acting alone or with other parties;

2. the calculated nature of the defendant's acts;

3. the forethought and deliberateness exhibited by the crime's execution;

4. the existence of a prior criminal record, and the severity of the prior crimes;

5. the defendant's age and personal circumstances at the time of the offense;

6. whether the defendant was acting under duress or the domination of another at the time of the offense;

7. psychiatric evidence; and

8. character evidence.

Barnes v. State, 876 S.W.2d 316, 322 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 174 (1994); *Keetnon v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987) ("Keeton I"). These factors are also helpful in this Court's evaluation of this question.

The facts of the instant case are brutal and barbaric enough to alone support the jury's answer to the special issue. The instant scenario began with underage drinking and fighting as a gang initiation rite. When the two victims came into the picture, appellant not only took full part in violently raping both of them and killing at least one of them, but appears to have initiated those actions.

In contrast to showing remorse afterward, appellant laughed about the incident, referred to the girls in derogatory terms, and enjoyed the spoils of the group's perceived conquest.

In addition, appellant has a history of misconduct and violent misbehavior both in school and out, with repeated suspensions, expulsions, and arrests dating back to the sixth grade. He has a history of threatening individuals with bodily harm or death and a history of being found in possession of a firearm. Before his imprisonment, appellant chose to spend his social hours with a group of young men who engaged in illegal drinking and violent behavior.

After being imprisoned, appellant continued to associate himself with weapons.

Given the totality of the evidence, we hold that a rational trier of fact could have believed beyond a reasonable doubt that "there is a probability that [appellant] would commit criminal acts of violence that would constitute a continuing threat to society," whether in prison or out. Point of error seven is overruled.

II. VOIR DIRE

Appellant complains in his third point of error that the trial court erred in granting the State's challenge for cause to venireperson R. L. Mackey pursuant to her views concerning the death penalty. The State contends the trial court did not abuse its discretion in granting the challenge for cause because the veniremember's attitude about the death penalty would have prevented or substantially impaired the performance of her duties as a juror in accordance with her oath and the instructions of the court. *See Wainwright v. Witt*, 469 U.S. 412 (1985); *Coleman v. State.*, 881 S.W.2d 344, 347-48 (Tex. Crim. App. 1994), *cert. denied*, ___U.S. ___, 115 S.Ct. 763 (1995). In reviewing such a point of error, we apply a deferential standard because the trial court was in the best position to evaluate the responses of the veniremember. *Coleman*, *supra*.

The record reveals the following pertinent exchanges:

THE COURT: Do you have any conscientious, religious, moral, or philosophical scruples against the infliction of death as punishment in an appropriate case?

[VENIREMEMBER:] No.

[THE COURT:] You said no, you don't. So do you have any opposition to the death penalty?

[VENIREMEMBER:] Religious beliefs. Thou shall not kill.

[THE COURT:] Well, you're entitled to those; and nobody is going to disagree with you.

* * *

What we don't want is someone whose beliefs are so strong that when they take an oath to follow the law and render a true verdict according to that law, that it's going to do violence to their conscience.

* * *

So, [veniremember], only you know the answer to this question. Are your religious beliefs so strong that you could not follow the oath you would have to take as a juror and render a true verdict according to the law and the evidence and if the evidence called for it, vote in such a way that it would result in the death penalty?

I know that's a mouthful. But did you understand the question? Might have been too long.

[VENIREMEMBER:] I could follow the law; but, like I say, it's just my religious belief. The law says one thing, and the religious belief says another.

[THE COURT:] Could you then participate with 11 other people in voting on these questions that we'll go over, in voting in such a way that you know would result in this defendant receiving a death sentence if the evidence called for it?

[VENIREMEMBER:] If the evidence called for it, yes.

* * *

[THE STATE:] And when you filled out your questionnaire, you stated to Question 86 – . . . that: I'm opposed to capital punishment under any circumstances.

Okay. Now, I take it, if you marked that, you had a reason for marking it, correct?

[VENIREMEMBER:] Yes, I did.

[THE STATE:] That's what you believe?

[VENIREMEMBER:] Uh-huh.

* * *

[THE STATE:] In response to . . . Question No. 12, you said: I do not believe in capital punishment under any circumstance; and you checked that "disagree."

And then in response to 89, you said you don't want to be a juror in this case because of your religious background, you don't think that you could.

[VENIREMEMBER:] Uh-huh, that's what I stated.

[THE STATE:] Followed by 90 that states: My Bible tells us thou shall not kill and this is my belief.

* * *

And if you were seated on this jury with those conflicts that you are having – I'm evidencing right now that perhaps you are having some conflict about this. Am I correct?

[VENIREMEMBER:] If – if – if – yes.

[THE STATE:] And only if I'm correct, ma'am. Certainly. Nobody is here to try to persuade you or make you participate in this. This is fully one where you have an opportunity to say: No; that if I was called upon to participate in this trial, that my belief would substantially impair me from participating and

returning a verdict of death in this case even if it was the right thing to do because of my religious belief.

Is that the way you feel?

[VENIREMEMBER:] Yes.

[THE STATE:] And you understand that I'm just a mere mortal man. I don't think I have the power of persuasion and [ability to] cloud your mind like the shadow could and get you to do my deed in light of your religious belief. And if you were selected on this jury, you would be more inclined to try to find a way, if you did end up on this jury, in some manner or form, you would try to find a way to come up with a life sentence, would you not, if you were put in that box?

[VENIREMEMBER:] That's correct.

* * *

[THE STATE:] To be a juror would substantially impair you from carrying out the law, following the law in this case, because of your religious belief?

You answered yes to that at one time.

[VENIREMEMBER:] The reason I said yes is I have just retired. And I worked with children, young adults, and I worked with young adults which have cancer. And my daughter died of cancer and that has a total thing with me for – I would say just to be in the situation like this, so I would rather not.

[THE STATE:] Well, one of the magic words, we have to have you say on the record. If it would substantially impair you from doing your duty as a juror, then you've met the qualification under the law to be discharged.

Would it substantially impair you –

[VENIREMEMBER:] Yes, it would.

Upon continued questioning by the parties and the court, the veniremember continued to express her feelings that she did not want to participate on this jury and that she would be inclined to answer the punishment questions in such a way that appellant would receive a life sentence. Given the totality of the voir dire, we cannot say that the trial court abused its discretion in sustaining the State's challenge for cause to the veniremember. *Coleman*, *Supra*; *see also Staley v. State*, 887 S.W.2d 885 (Tex. Crim. App. 1994). Point of error three is overruled.

In his fourth point of error appellant claims the trial court erred in overruling his *Batson*[5] and Article 35.261[6] challenges to the State's peremptory strike of venireperson R. Rodriguez. The record reveals that after the State exercised its peremptory strike on the venireperson, appellant

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[5] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[6] Article 35.261 prohibits the use of peremptory challenges on racial grounds. It reads in pertinent part:

> (a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

stated, "we'll make a Batson challenge." Nowhere did appellant invoke the application of Article 35.261 or move for a dismissal of the array. Furthermore, appellant has not separately argued the protection of 35.261 in his brief. Hence, we find any complaint as to Article 35.261 has not been preserved for appellate review. *Camacho v. State*, 864 S.W.2d 524, 528 (Tex. Crim. App. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1339 (1994); Tex. R. App. Proc. 52(a).

With regard to appellant's *Batson* claim, we stated in *Satterwhite v. State*, 858 S.W.2d 412, 423 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 455 (1993):

> In order to invoke the protections set forth in *Batson*, appellant must first raise an inference of purposeful discrimination through the State's use of its peremptory strikes. Once appellant has established such purposeful discrimination, the burden of production shifts to the prosecutor to come forward with racially neutral explanations for the strikes. Once the prosecutor has articulated racially neutral explanations, the burden shifts back to the defendant to persuade the trial court that the "neutral explanation" for the strike is really a pretext for discrimination. [Citations omitted.] This Court will reverse the trial court's resolution of a *Batson* issue only if the court's findings are found to be clearly erroneous.

In the complained-of instance, appellant made a *Batson* challenge and offered the veniremember's questionnaire as evidence. He noted that the veniremember stated that he could basically look at both sides and was generally in favor of the death penalty. After noting that this was a

Batson claim and not a *Wainwright v. Witt* claim,[7] the trial court held that a prima facie case had been established. The prosecutor then gave the following race reasons for striking Rodriguez:

> My reason for striking Mr. Rodriguez is there was a great deal of hesitation with his explanation on the death penalty when he was speaking with you. He's also for the death penalty without any compulsion whatsoever if it happened to one of his relatives. I still do not have a full understanding of his position on the death penalty.
>
> With respect to the question I asked him, he gave me a philosophical – he gave a theological and Biblical and his own philosophy. One of the things put me on edge, turning the cheek, you turning the other cheek. That goes back to the philosophy if you're slapped, you turn the other cheek.
>
> I'm afraid he may be looking to turn the other cheek in this case, and I don't want it turned in my favor.

The trial court accepted these reasons as race-neutral and appellant made no attempt to rebut the explanations given or otherwise explain why they were only pretexts for discrimination. A review of the entirety of the veniremember's voir dire reveals that the prosecutor's reasons were supported by the record. Given this, we cannot say that the judge's ruling in this instance was clearly erroneous. *See Satterwhite, supra.* Point of error four is overruled.

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[7] 469 U.S. 412 (1985).

In his eighth and ninth points of error, appellant claims the trial court reversibly erred in granting school exemptions for prospective jurors M. L. Lambeth and P. S. Jolly. The August 11, 1994, voir dire of Lambeth revealed that the venireperson had recently graduated from Texas A & M University. However, she had also completed one semester of Nursing School. Furthermore, it was established that Lambeth was only on summer break and had already enrolled in and paid for nine hours of Nursing classes for the fall semester which would commence on August 29, 1994. Because her classes were scheduled to run every day of the week, and because the trial was not scheduled to begin until September 12, 1994, it was undisputed that the trial and the classes would conflict.

Tex. Gov't Code § 62.106 states that:

> A person qualified to serve as a petit juror may establish an exemption from jury service if he:
>
> * * *
>
> (4) is a person enrolled and in actual attendance at an institution of higher education[.]

Even if Lambeth was not properly excused under this section,* the judge properly excused her under Tex. Code of

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* Appellant contends that she was not properly excused pursuant to this section because she was not attending classes *at the time of voir dire*. However, we note that Gov't Code § 62.106 deals with "jury service" and not voir dire. In the instant case, the venireperson would be attending classes *at the time of "jury service."*

Appellant also contends under this point that Nursing School is a "technical" or "vocational" school and not an "institution of higher education." Given the disposition of the point of error, we need not address this contention here.

Crim. Proc. Article 35.03." *See Butler v. State,* 830 S.W.2d 125, 131-132 (Tex. Crim. App. 1992); *Harris v. State,* 784 S.W.2d 5, 18-19 (Tex. Crim. App.1989), *cert. denied,* 494 U.S. 1090 (1990).

Jolly's voir dire also established that while she was not in school at the time of her individual voir dire on August 10, 1994, she had registered and paid for college classes which she would attend, commencing August 29, 1994. Although Jolly testified that she might be able to make up the classes she would miss due to the trial, she was not sure about this and she did not want to get behind in her classwork. As with Lambeth, the trial judge excused the potential juror pursuant to Tex. Gov't Code § 62.106 as well as Tex. Code of Crim. Proc. 35.03. As with the previous point, we hold that, even if the trial court erred in excusing the veniremember pursuant to Tex. Gov't Code § 62.106, she was properly excused under Article 35.03. *See Butler, supra*; *Harris, supra.* Points of error eight and nine are overruled.

III. ADMISSION OF EVIDENCE

Appellant contends in his second point of error that the trial court erred "in admitting into evidence the appellant's written custodial statement obtained after his unlawful arrest." Appellant notes that he was arrested pursuant to an arrest warrant. However, he states

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" Article 35.03 states in pertinent part:

Sec. 1. Except as provided by Sections 2 and 3 of this article, the court shall then hear and determine excuses offered for not serving as a juror, and if the court deems the excuse sufficient, the court shall discharge the juror or postpone the juror's service to a date specified by the court.

with-out authority or analysis that the affidavit for the warrant was insufficient on its face to provide probable cause to arrest appellant. Hence, he concludes, appellant's statement was the fruit of an illegal arrest and thus should not have been admitted at trial. Appellant then proceeds to argue why the taint from the arrest was not attenuated.[10]

Appellant seems to be complaining that because the affidavit on its face did not specifically tie appellant to the two bodies found, it was insufficient to support probable cause. We disagree. It is well-settled that, in determining the sufficiency of an affidavit for an arrest or search warrant, a reviewing court is limited to the "four corners of an affidavit." *Jones v. State,* 833 S.W.2d 118, 123 (Tex. Crim. App. 1992), *cert. denied,* 507 U.S. 921 (1993). However, this determination is not meant "to place legalistic blinders on the process wherein a neutral and detached magistrate must decide whether there are sufficient facts stated to validate issuance of a proper warrant." *Id.* Rather, the warrant affidavit should be interpreted in a common sense and realistic manner and the reviewing magistrate is permitted to draw reasonable inferences from the information contained therein. *Id.*

The affidavit in the instant cause reads as follows:

> On June 28, [sic] 1993, your affiant [a homicide investigator employed by the Houston Police Department] personally went to a wooded area

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[10] Because appellant has given us nothing more than his conclusory statement that the affidavit was insufficient to show probable cause, he has inadequately briefed this point of error. Tex. R. App. Proc. 74(f). However, we have reviewed the affidavit in the interest of justice.

within the vicinity of West 34th St. and T. C. Jester in Houston, Harris County, Texas. At that location your affiant observed the bodies of two females, one of them was naked, and the other was partially unclothed and both appearing to have been dead for several days based upon the decomposition which had taken place on their bodies. The amount of decomposition which had taken place made the identification of the bodies by physical features difficult, if not impossible. The bodies were removed to the Harris County Morgue for complete autopsies and for dental analysis and comparison with the dental charts of two missing females, Jennifer Ertman and Elizabeth Pena.

Your affiant is personally aware that a report had been made to the Houston Police Department that Jennifer Ertman and Elizabeth Pena had been reported missing since June 24, 1993. Your affiant has personally read Houston Police Department report number 66830993 which was prepared by R. L. Curl of the Houston Police Department and which states that on June 25, 1993, Randy Ertman called the Department to state that his daughter, Jennifer Ertman and her friend, Elizabeth Pena were last seen walking from a friends house at approximately 11:00 P.M. on June 24, 1993 and that they said that they were going to take the short cut along the railroad tracks which are near T. C. Jester and West 34th and that they were going to go to Ertman's apartment. He reported that his daughter nor the other girl had been seen.

Your affiant is aware that an investigation had begun by the Houston Police Department in order to locate the two missing girls.

Your affiant is aware that on June 27, 1993 a man called the Houston Police Department dispatcher claiming to be Mr. Gonzalez [sic] and who told the dispatcher a possible location where the bodies of the two girls could be found. Your affiant is aware that officers of the Houston Police Department were sent to the location that "Mr. Gonzales" told them of and the officers were unable to locate their bodies.

On June 24, [sic] 1993, the same person called back claiming to be Mr. Gonzales and giving them a more specific location where the bodies could be located. He told the dispatcher that he had found the bodies himself and wanted to let the police department know. where the bodies were. On this occasion, your affiant personally went to the location as given to the dispatcher by "Mr. Gonzales" which was a wooded area near the intersection of T. C. Jester and West 34th St., Houston, Harris County, Texas. It was at this time that your affiant observed the bodies of the two girls.

Later on June 24, [sic] 1993, your affiant received information from officer Ken Weiner of the Houston Police Department Crime Stopper Division. He told your affiant that a female had called him telling him that her sister told her that her husband's, the caller's brother in law, brother had admitted to both her sister and her sister's husband that he and several other men had grabbed the two girls near the railroad tracks which run near the intersection of T. C. Jester and West 34th and that they raped and then killed the two girls. Weiner told your affiant that the caller left him her telephone number. Your affiant is personally aware that Officer Todd Miller of the Houston Police Department

Homicide Division called the telephone number and spoke with veronica Barroso who told Miller that her sister and brother in law are Christina and Joe Adam Cantu and that they live at 1128 Ashland in Houston. She further said that Christina told her that her brother in law, Peter Cantu, and Joe Madellin both admitted to both her and her husband Joe Adam Cantu that they, along with some other men, saw the two girls walking down the railroad tracks near T. C. Jester and West 34th the night of June 24, 1993 and that they all grabbed the girls, raped them and then killed them.

Based upon the aforesaid, your affiant brought Joe Adam Cantu to the offices of the Houston Police Department Homicide Division on June 28, 1993 in order to talk with him about this information. Cantu gave a sworn affidavit to [Officer] Todd Miller in which he states, under oath, that in the early morning hours of June 25, 1993, his brother, Peter Cantu, who lives with him and his wife in the house on Ashland St. came into the house along with Efrin

Perez and another man whose name he did not know. He said that Peter, Efrin, Jose Madellin and the other man started telling him about two girls that they raped and killed in the woods near the railroad tracks near West 34th and T. C. Jester. They showed him jewelry that they had taken from the girls and they admitted raping the two girls and then killing them by strangling them and leaving the bodies out in the woods. He then said that later a black male who he knows as Derrick Shawn O'Brien called his house and told him that he, too, had participated in the rapes and the murder of the two girls.

Your affiant has checked the records of the Houston Police Department and learned that Joe Adam Cantu has only one arrest for a Class C Misdemeanor ticket but that he has no other arrests and is going to school at this time and is close to graduating from the school.

As of the making of this affidavit your affiant has not learned from the Harris County Medical Examiner's Office as to the caused (sic] of death of either of the two girls. Further, your affiant is not aware that a positive identification has been made of the two bodies but, based upon all of the information that your affiant has gathered it is the opinion of your affiant that the two bodies that were found this morning are, in fact, the bodies of Jennifer Ertman and Elizabeth Pena.

Based upon the admissions which were made by the aforementioned Defendants to Cantu in which each of the men stated that they each raped the two girls and the fact that your affiant is personally aware, based upon years of experience as a Homicide investigator for the Houston Police Department, it is the opinion of your affiant that the DNA of each of the men who raped, the girls will be present in fluid samples extracted from the deceased girls during the autopsies. Further, by taking blood and saliva samples from each of the Defendants upon their arrest it will be possible for chemists to extract from those samples the known DNA of each Defendant and to then compare that with the DNA found from the autopsies of the two dead girls which will be evidence of the guilt of each defendant in these Capital Murder cases.

The affidavit contains facts which establish probable cause. In short, the affidavit states that two girls had

disappeared on June 24, 1993, and were last known to be in a specific area of Houston that evening. Pursuant to a tip received by law enforcement personnel three days subsequent to the girls' disappearance, two female bodies were discovered in the same area in which the girls were last known to be. These bodies were determined to have been deceased for several days. In calling the telephone number left by the tipster, police officers located one Joe Cantu who told them, under oath, that his brother, appellant, and some others had come to his home in the early morning hours of June 25, 1993, claiming to have just raped and killed two girls in the precise area in which the two girls had last been placed and the two female bodies had been found.

Additionally, each individual cited within the affidavit is identified by name, and some are also identified by address. The majority of the facts contained in the affidavit were told either directly to the affiant, or to other law enforcement personnel. *Earhart v. State,* 823 S.W.2d 607, 631 (Tex. Crim. App. 1991), *vacated on other grounds,* ___ U.S. ___, 113 S.Ct. 3026 (1993)[1]; *Wilkerson v. State,* 726 S.W.2d 542 (Tex. Crim. App. 1986), *cert. denied,* 480 U.S. 940 (1987). Hence, we hold that the affidavit contained sufficient information with which a detached magistrate could have found probable cause. *Id.*

Because appellant was arrested pursuant to a lawful arrest warrant, the trial court did not err in denying

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[1] *Earhart* was vacated by the United States Supreme Court and remanded to this Court in light of *Johnson v. Texas,* 509 U.S. ___, 113 S.Ct. 2658 (1993). The case was then reaffirmed by this Court. *Earhart v. State,* 877 S.W.2d 759 (Tex. Crim. App.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 431 (1994).

appellant's motion to suppress his custodial statement.[12] Point of error two is overruled.

In supplemental points of error two-(A) through two-(E), appellant claims the trial court abused its discretion in determining his custodial statement was given intentionally, knowingly, and voluntarily, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 10 and 19 of the Texas Constitution; and Articles 38.22 and 38.23. Appellant briefs all of these contentions together. Appellate urges that we abandon our previous standard of reviewing voluntariness of a statement in favor of the standard set forth in *Clewis v. State,* 922 S.W.2d 126 (Tex. Crim. App. 1996). Appellant says that under this standard, we would have to conclude that the trial court abused its discretion in concluding his statement was voluntarily made.

At a hearing on a motion to suppress a defendant's statement, the trial court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Penry v. State,* 903 S.W.2d 715, 744 (Tex. Crim. App. 1995); *Romero v. State,* 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). Therefore, if the record supports the trial court's findings, we will not disturb those findings. *Id.* On appeal, we only consider whether the trial court applied the law to the facts properly. *Id.* In *Clewis,* we held that courts of appeals have jurisdiction to review questions of fact, and in reviewing factual sufficiency of the elements of the

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[12] To the extent appellant may otherwise be complaining that his statement was not voluntarily given, he has not adequately set out the issue in a separate point of error or properly briefed it. Therefore, any further claim as to appellant's statement will not be entertained here. Tex. R. App. Proc. 74(f).

offense, the court of appeals "should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." 922 S.W.2d at 134-36.

We leave for another day whether we will extend *Clewis*.[11] Even if *Clewis* were applied to the facts of this case, appellant would not be entitled to relief. After giving his written statement, appellant gave a tape recorded statement to another officer. This tape recorded statement was not admitted into evidence and appellant does not question its legality. But appellant says the recording reflects that he asked for an attorney and that this is evidence that he had wanted an attorney at the time of his written statement. While the tape is not made a part of the record on appeal, the trial court made the following findings of fact regarding the taped conversation:

> Officer C.C. Abbondandolo . . . conducted an oral, taperecorded interview with the defendant.
>
> Abbondandolo provided cigarettes to the defendant and arranged for him to be served a meal, but the defendant stated that he did not like the food and declined to eat it.
>
> Abbondandolo warned the defendant of his rights pursuant to art. 38.22, 5 2, supra, and *Miranda v. Arizona, supra*. The appellant asked if an attorney could be appointed immediately, and

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[11] *See German v. State*, No. 10-94-192-CR slip op (Tex. App.– Waco July 5, 1995) (do not publish), *reh'g denied* (Aug. 2, 1995) (do not publish) *pet. granted* (PDR No. 1036-95 granted to determine whether great weight and preponderance of evidence standard for factual sufficiency applies to trial court's ruling on mixed questions of fact and law).

> Abbondandolo responded that if he wanted an attorney at that time, they would have to terminate the interview.
>
> The defendant indicated that he desired to continue with the interview, and he voluntarily discussed the rape and murder . . .

The fact that appellant requested an attorney during his tape recorded statement does not render the trial court's conclusions as to the voluntariness of his previous written statement "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." It does not strain credibility to believe that a defendant might provide a written statement without invoking his right to an attorney, but change his mind while giving a second statement and request an attorney at that time. Appellant contends his request for an attorney during the taped conversation clearly indicates that he did not understand his rights at the time of the written statement. This, without more, does not follow. Therefore, even if a *Clewis* standard were applied here, which we expressly do not decide, appellant's claim would have no merit. Appellant's points of error two-(A) through two-(E) are overruled.

In his fifth point of error, appellant alleges the trial court erred in admitting into evidence scene and autopsy photographs of the two deceased victims because their probative value was far outweighed by their prejudicial value in violation of Tex. R. Crim. Evid. 403. Appellant recognizes that this Court has held that a photograph is generally admissible where a verbal description of the same is admissible. *Long v. State*, 823 S.W.2d 259, 270 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992). But, he maintains that, in the instant case, the photographs' prejudicial value substantially outweighed any

probative value they may have had thus rendering them inadmissible. In his point of error, appellant refers to thirty-nine (39) different photographs, three (3) of which appear to be scene photographs with the remainder being autopsy photographs of the two different victims.

Of the three photographs depicting the crime scene, one shows both victims as their bodies appeared in relation to the surrounding environment. One of the remaining two photographs shows a close-up shot of one of the victims in the position in which she was found while the other photograph shows the second victim as she was found. Although these photographs are gruesome, they are highly probative in reflecting the nature and scene of the crime and the extent of some of the victims' injuries. *Barnes v. State*, 876 S.W.2d 316, 326 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 174 (1994).

With regard to the autopsy photographs, the medical examiner told the trial court that she needed all of the photographs to testify to the nature and extent of the injuries inflicted. While these photographs are also grotesque and depict extensive environmental deterioration of the subject pictured, they are probative in reflecting the nature of the crime in the context in which it occurred and the extent of some of the injuries. This visual evidence was also probative of the perpetrator's state of mind and intent during the commission of the crime due to the nature and extent of the injuries inflicted. Given the totality of the evidence, we cannot say that the trial court abused its discretion in finding that the prejudicial effect of the photographs, if any, did not outweigh their probative value. Point of error five is overruled.

Finding no reversible error, we affirm the judgment of the trial court.

MEYERS, J.

Delivered March 19, 1997
Do Not Publish
En Banc

Appeal from Harris County
No. 71,997

JOSE ERNESTO MEDELLIN,

Appellant

– v. –

THE STATE OF TEXAS,

Appellee

CONCURRING OPINION

I concur in the result as to appellant's supplemental points of error, and otherwise join the opinion of the Court. However, I would directly address the merits of appellant's supplemental points of error and make clear to the, bench and bar that Clewis v. State, 922 S.W.2d 126 (Tex.Cr.App. 1996), has no application in reviewing a trial court's determination of a motion to suppress.

McCormick, Presiding Judge

(Delivered March 19, 1997)
En Banc
Do Not Publish

Statement of Jose Ernesto Medellin,
State's Trial Exhibit 113 at 000076,
State v. Medellin, No. 675430 (339th Dist. Ct. 1994)

STATEMENT OF PERSON IN CUSTODY

Tuesday, June 29, 1993 Time: 554 Hrs.

Statement of **Jose Ernesto Medellin** taken in Harris County, Texas.

Prior to making this statement I was warned by Sgt. L.W. Hoffmaster of the Houston Police Homicide Division, the person to whom this statement was made, that:

1.) JEM I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
Response: **yes sir.**

2.) JEM Any statement I make may be used as evidence against me in court; Response: **yes.**

3.) JEM I have the right to have a lawyer present to advise me prior to and during any questioning;
Response: **yes sir.**

4.) JEM If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
Response: **yes sir.**

5.) JEM I have the right to terminate, or stop, this interview at any time.
Response: **yes sir.**

6.) JEM Prior to and during the making of this statement I knowingly, intelligently and voluntarily waived, or gave up, the rights set out above and made the following voluntary statement:
Response: **yes sir.** JEM

My name is Jose Ernesto Medellin. I am 18 years old years old. I was born in Laredo Mexico on 3/4/75. I last went to school at Eisenhower High School and have a total of 8 years of formal education.

On Thursday June 24th, 1993, around 8:30 or 9:00PM in the evening, I went to the Brook Green apartments with Raual (doesn't know last name), Peter Cantu, my little brother Venancio Medellin Jr., Efrain Perez, Frank Sandaval and his brother Roman Sandaval. Another friend Sean Derrick Obrien, lives in the Brook Green Apartments. I went to Sean's Apartment and told him that we were going to initiate Raual into our gang. Sean and I went to the parkinglot to go meet the others. Then we went to the railroad tracks behind the Brook Green Apartments and crossed over to the grass area on the banks of the bayou. Peter told Sean to take him, meaning to fight Raual, Raual's initiation was going to be to fight all of us. Sean said no I can't see, it's too dark. Sean has vision problems.

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK	6-29-93	7:23 AM
M. E. DOYLE	6-29-93	7:23 AM

Page 2 of Custodial Statement of Jose Ernesto Medellin.

Me and Peter were talking to Sean about it. We called Roman Sandoval to where we were and told Roman to take him. Roman said no man he's a little bit to big for me. Then we told Roman that if we were to get into a fight out on the street he wouldn't be able to say that. Roman said

fuck it, I'll take him. Roman went up to Raual and started fighting with him. They stopped fighting and Sean said fuck it, I'll whip his ass to. Then Sean started fighting with Raual. They stopped fighting and Peter said I'll take him. I told Peter no you are the leader I'll take him. I fought Raual and then we stopped. Then Peter said you take him Junior, meaning Efrain Perez and they started fighting. When they stopped Peter told Raual that if he could stand up for more than ten seconds, he was in. Then we went back to the tracks in the middle of the railroad bridge and we were drinking up there. We were talking and drinking and we said fuck it lets find something else for him to do.

We were walking back to the parking lot and as we were walking down the tracks a girl passed by us. When Peter saw the second girl, he said kick his ass Junior to Efrain Perez. Peter thought the hispanic girl was a boy. We started talking to the two girls, they told us their names were Jenifer and Elizabeth and that they had to go home.

Peter grabbed Jenifer and said bitch your going to come over here. Peter told Raual to grab the other one. The were saying let us go please and Peter said bitch were going to fuck your ass. Elizabeth said don't hurt me I'll let you do it. I was with Peter and Elizabeth and Sean, Raual and Efrain were with Jenifer. Peter was having sex with Elizabeth, then Peter ask her for her phone number and she gave him a number, 686-3267. Then Peter ask her why don't you suck my friends dick, meaning me, and she said yes. Then she did it. Elizabeth told me to hurray up that she had to go home. She ask Peter you're going to let us go right and he said yes.

While this was going on Raual, Sean and Efrain were taking turns having sex with Jenifer.

Then Peter called Raual and me over to where he was. Peter told my little brother to get all their stuff, beepers, watch, rings and necklaces. Then we took them to the woods and Efrain began having sex with Elizabeth in the woods and Sean with Jenifer. Then Peter told Raual to kill Jenifer, Sean handed Raual a belt and said do it with this. Raual strangled Jenifer with the belt. The belt tore and Jenifer fell to the ground and Peter told Raual to use his foot, to put his foot on her throat and step on it. Then Raual did that. Peter told Efrain to do the same thing to Elizabeth but to use his shoe lace. Efrain couldn't get a good grip so he told me to hold one end of the shoe lace. Then Efrain got a better grip on the shoe lace and took it

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK	6-29-93	7:23 AM
M. E. DOYLE	6-29-93	7:23 AM

Page 3 of Custodial Statement of Jose Ernesto Medellin.

back and continued to choke Elizabeth. Efrain let go and she was still moving and Peter told him to step on her throat and Efrain did that.

As all of this was going on, my little brother walked by and Peter told me to tell him to leave, so that he wouldn't see it but they had already started killing the girls.

As we were leaving Raual said I don't think this bitch is dead, he was talking about Jenifer. Raual started

stomping on Jenifer's face with his foot. Then he started doing the same thing to Elizabeth. Then we left.

Raual kept some of the jewelry and I threw one of the beepers in the bayou and Peter threw the other beeper in the bayou. Then we went home. The Mickey Mouse Watch that my little brother Venancio had belonged to one of the girls, I don't know which one.

I have read this, my statement, consisting of 3 page/pages, and finished reading it at 7:23 Hrs.

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK	Pr# 39034	Date:	6-29-93
M. E. DOYLE	Pr# 40900	Time:	07:23 Hrs.

End of statement of Jose Ernesto Medellin.

Affidavit of Manuel Perez Cardenas, the Consul General of Mexico, filed in support of state post-conviction application for a writ of habeas corpus; Ex parte Medellin, No. 675430-A (339th Dist. Ct. 2001); No. 50,191-01 (Tex. Crim. App. 2001).

AFFIDAVIT OF MANUEL PEREZ-CARDENAS

STATE OF TEXAS §

COUNTY OF HARRIS §

My name is Manuel Perez Cardenas, Consul General of Mexico in Houston, Texas. My current address is 1440 Westoffice Drive, Houston Texas 77042. I am above the age of eighteen (18) years and am competent in all respects to make this oath. I am personally acquainted with the facts herein stated.

I am the Consul General of Mexico in Houston, Texas. One of the duties of the Mexican Consulate in Houston is to advise any Mexican National who, having been arrested or detained for some crime committed here, exercises his right under Article 36 of the Vienna Convention on Consular Relations of 1963, to contact the Mexican Consulate for help in responding to the fact of his detention, dealing with the arresting authority, and arranging for representation for local legal counsel. When Jose Ernesto Medellin was arrested for capital murder in Harris County he was not advised of his right to contact with his Consulate, the Mexican Consulate was not timely informed. Had the Mexican Consulate been informed of Jose Ernesto Medellin arrest, an officer of the Consulate would have contacted him immediately to explain to him the full significance and importance of his right under Miranda Warning included to have legal counsel present to serve as an intermediary between himself and the

police in the custodial setting (particularly in a capital charge). Had the Mexican Consulate been timely informed of Jose Ernesto Medellin's arrest, an officer of the Consulate would have immediately arranged to have legal counsel present during any custodial interrogation. Finally, had the Mexican Consulate been told Jose Ernesto Medellin's detention, the Consulate representative would have strongly advised him that he had a right not to speak to the police except on the advice and in the presence of his legal counsel, and that it would be in his best interest not to speak to the police unless and until his lawyer might advise that he do so. "Nothing included in this document shall be construed or interpreted as a waiver of the immunities, privileges and rights of Consul General Manuel Perez Cardenas, established by the Vienna Convent on Consular Relations, the US-Mexico Consular Convention of 1942, and international law".

MANUEL PEREZ-CARDENAS
Manuel Perez-Cardenas
Consul General of Mexico in Houston

SIGNED under oath before me on March 24, 1998

[NOTARY STAMP]
LISA MILSTEIN
Notary Public, State of Texas
My Commission Expires
04-15-2001

LISA MILSTEIN
NOTARY PUBLIC, State of Texas

IN THE 339TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 675430-A

EX PARTE

JOSE ERNESTO MEDELLIN,

Applicant

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 675430, affidavits submitted in cause no. 675430-A, and official court documents and records, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Jose Ernesto Medellin, was indicted and convicted of the felony offense of capital murder in cause no. 675430 in the 339th District Court of Harris County, Texas.

2. The applicant was represented during trial by counsel Jack Millin, now deceased, and Linda Mazzagatti.

3. On September 20, 1994, the trial court assessed the applicant's punishment at death by lethal injection

after the jury affirmatively answered the first two special issues and negatively answered the third special issue.

4. The Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion delivered March 19, 1997. *Medellin v. State,* No. 71,997 (Tex. Crim. App. Mar. 19, 1997) (not designated for publication).

First Ground – ineffective assistance of appellate counsel re Batson claim: Fourth Ground – Batson claim:

5. The Court finds that, during the State's voir dire examination of prospective juror Elizabeth Ann Berry, she stated that both of her brothers had been arrested for drug-related offenses; that both have had a "number of cases;" that one was "serving time now;" that they had been in and out of the prison system often in the last five or six years; and, that the cases were prosecuted in Harris County (R. XX – 181-2).

6. The Court finds that, on the juror questionnaire, prospective juror Elizabeth Berry described a defense attorney as the underdog, always fighting, and a prosecutor as "on the attack" (R. XX – 184).

7. The Court finds that the State exercised a peremptory strike at the conclusion of the voir dire examination of prospective juror Elizabeth Berry, and the applicant made a *Batson* challenge (R. XX – 226).

8. The Court finds that the trial court requested that the State, "regardless of a prima facie showing," offer an explanation for the strike of prospective juror Elizabeth Berry, and that the State explained that the strike was based upon Berry having two brothers involved in drugs and serving time in prison; that one brother had been in

prison on numerous occasions; and, that one brother was presently on parole and the other brother was presently in custody (R. XX – 227-8).

9. The Court finds that the State, in explaining its strike of prospective juror Elizabeth Berry, noted Berry's characterization of the prosecution as on the attack and the defense as the underdog and stated that, as a result, the State would have the perception during the trial that Berry viewed the applicant as the underdog and the prosecutor as a "wild mongrel" on the attack (R. XX – 228).

10. The Court finds that the State, via prosecutor Mark Vinson, stated that he had an appreciation of blacks serving on juries, because he was a black male who grew up during the 1940's, 50's, 60's, 70's, 80's, and 90's (R. XX – 229).

11. The Court finds that the trial court stated that it did not believe that a *prima facie* showing had been made at that time, but the trial court found that the State's reasons for striking prospective juror Elizabeth Berry were race-neutral based on Berry's demeanor and her responses and her juror questionnaire (R. XX – 230).

12. The trial court denied the applicant's *Batson* motion and informed the applicant that the court would reconsider the motion if the applicant wanted to reurge it at the end of jury selection (R. XX – 230).

13. The Court finds that the trial court noted, after denying the applicant's *Batson* challenge, that the jury was then composed of nine people, including a black female, a black male, an Hispanic male, and an Hispanic female; that there was no indication of gender bias; and, that the jury composition at that time was a black female,

two white females, an Hispanic female, an Hispanic male, two white males, and a black male (R. XX – 230-1).

14. The Court finds that, during the State's voir dire examination of prospective juror Rafael F. Rodriguez, the State noted that there was hesitation on Rodriguez's part regarding the death penalty when questioned by the trial court and Rodriguez stated that he had not given the death penalty much thought (R. XXI – 71).

15. The Court finds that, during the State's voir dire examination of prospective juror Rafael Rodriguez, his responses concerning his thoughts on the death penalty were unclear and ambiguous (R. XXI – 90, 92-6).

16. The Court finds that, at the conclusion of the voir dire of prospective juror Rafael Rodriguez, the State exercised a peremptory strike on Rodriguez and the applicant made a *Batson* challenge, noting that the applicant and Rodriguez are both Hispanic (R. XXI – 115-6).

17. The Court finds that, at the conclusion of the State's voir dire of prospective juror Rafael Rodriguez and after the applicant's *Batson* challenge, the trial court made a finding of a *prima facie* case, and the State gave the following explanations for the peremptory strike of Rodriguez: that he had a great deal of hesitation when he was talking about the death penalty with the trial court; that the State still did not have a full understanding of Rodriguez's position on the death penalty; and, that Rodriguez had stated that he was absolutely in favor of the death penalty without any compunctions if the victim were a relative of Rodriguez (R. XXI – 117).

18. The Court finds that the State also noted that prospective juror Rafael Rodriguez's theological and

philosophical reply during voir dire examination concerning "turning the other cheek" indicated that Rodriguez would be "looking to turn the other cheek in this case . . . " (R. XXI – 118).

19. The Court finds that the trial court found that the State's explanation for the peremptory strike of prospective juror Rafael Rodriguez was a racially neutral explanation and the trial court denied the applicant's *Batson* challenge (R. XXI – 118).

20. The Court finds that the applicant, on August 17, 1994, presented a written motion to strike the jury panel based, in part, on the State's exercising thirteen preemptory strikes against the following prospective jurors, as noted by the applicant: (1) Kirven O'Neal Tillis, black male; (2) Mary Freeman, white female; (3) Kathy Felder, black female; (4) Bernard Richardson, black male; (5) Walter Wynn Martin, white male; (6) Andra McCoy, black male; (7) Marie Clark, white female; (8) Vastine Dickie, black male; (9) Christine Rossi, white female; (10) Raford Earl Gresham, white male; (11) Porfirio Rodriguez, Jr., Hispanic male; (12) Elizabeth Ann Berry, black female; and (13) Rafael Rodriguez, Hispanic male (R. I – 264-5) (R. XXVI – 11).

21. The Court finds that, on August 17, 1994, the applicant presented the following argument in support of its motion:

> And the State exercised six of it's (sic) peremptory challenges against black venire members and eight of it's (sic) peremptory challenges against males and the State exercised two of it's (sic) peremptory challenges against Hispanic male venire members. And this also includes a Batson Challenge. And, of course, the

> Court – I agree that whatever Batson challenges were preserved during the proper objection at the time would be the Batson Challenges that would be considered. But we are bringing to the Court's attention that these persons have been struck and that we would suggest to the Court that it's a prima facie case of discrimination for the State's use of peremptory challenges and we would suggest to the Court that the motion – that our Motion to Strike the Panel be also granted on this premise.

(R. XXVI – 11-2).

22. The Court finds that the State, in response to the applicant's August 17, 1994 argument in support of the applicant's motion to strike the panel, informed the trial court that the record reflected that the final jury was a "melting jury" and that the thirteen noted peremptory strikes were racially neutral (R. XXVI – 12-3).

23. The Court finds that the trial court denied the applicant's motion to strike the jury panel by written order on August 19, 1994 (R. I – 267).

24. The Court finds that the State exercised thirteen peremptory strikes and that a review of the State's peremptory strikes, as noted in the applicant's motion to strike the jury panel, shows that the State struck three white females and two white males, comprising almost fifty percent of the State's thirteen total peremptory strikes (R. I – 264-5) (R. XXVI – 11-2).

25. The Court finds, based on personal recollection, that the prosecutor in the applicant's case was also the prosecutor in the 1993 Harris County capital murder trial of Kenneth Wayne Morris; that the trial judge in the applicant's case and the trial judge in Kenneth Wayne

Morris' case was the same person; that the prosecutor offered an explanation for a peremptory strike during jury selection in Kenneth Wayne Morris' case; that the trial judge found the prosecutor's explanation to be racially neutral in Kenneth Wayne Morris' case; and, that the trial judge noted in Kenneth Wayne Morris' case that the same prosecutor had tried a capital case three months earlier and that there were either three or four black jurors. *See Volume 4, page 115, appellate record of The State of Texas v. Kenneth Wayne Morris, cause no. 597997.*

26. The Court finds that the Court of Criminal Appeals, on direct appeal of the capital murder conviction of Kenneth Wayne Morris, overruled Morris' claim that the trial court improperly based her ruling on the absence of purposeful discrimination by the same prosecutor in another criminal trial and stated, "A ruling on a *Batson* objection is a credibility determination. Because the trial judge determines the issue of the prosecutor's credibility, it is not error for the court to consider its past experiences with a prosecutor in determining his credibility." *Morris v. State*, 940 S.W.2d 610, 612 (Tex. Crim. App. 1996).

First Ground – ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty:

27. The Court finds that the applicant, prior to trial, filed a written motion to preclude the State from seeking the death penalty and that the clerk's file-mark on the face of the motion notes that the motion was filed at 2:00 p.m. on July 29, 1994 (R. I – 95-107).

28. The Court finds that the face of the applicant's written motion to preclude the State from seeking the death penalty shows the following stamp:

> On The Record
> Date: 9/9/94
> Ct. Reporter: Wong Lee

(R. I – 108).

29. The Court finds that the written order accompanying the applicant's motion to preclude the State from seeking the death penalty is signed by the Honorable Caprice Cosper, the presiding judge of the 339th District Court and that there are initials placed on the line next to "GRANTED" (R. I – 108).

30. The Court finds, based on the appellate record, that the trial court ruled on pre-trial motions and verbally denied the applicant's objection to preclude the State from seeking the death penalty (R. XXVII – 9).

31. The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error.

32. The Court finds that the applicant's written motion to preclude the State from seeking the death penalty and its accompanying order were a request for the trial court to preclude the State from seeking the death penalty, not a motion requesting that the State be precluded from carrying out a constitutionally valid death sentence after such sentence is assessed.

33. The Court further finds, based on the applicant's trial in which the State sought the death penalty and on

the applicant's resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death.

Second Ground – ineffective assistance of counsel re contacting probation officer:

34. The Court finds that evidence was presented during the guilt-innocence phase of the applicant's trial showing that the applicant and his co-defendants, Peter Cantu, Efrain Perez, Derrick Sean O'Brien, and Raul Villarreal, took turns sexually assaulting the complainant and Jennifer Ertman (R. XXXII – 948-9); that the applicant participated in the strangulation deaths of the complainant and Ertman after the repeated sexual assaults (R. XXXII – 949); that the applicant afterwards laughed and bragged about his part in the sexual assaults and murders (R. XXIX – 389-90); that the applicant said that he "fucked one of the girls in the pussy" and then "fucked her in the ass;" (R. XXIX – 391-2); that the applicant said that he made one of the girls give him a "blow job" and that he hit her on the top of her head when she would not close her mouth (R. XXIX – 395, 425); and, that the applicant later showed Christina Cantu his underwear with blood on it and stated that he could not believe that one of the girls was telling the truth when she said that she was a virgin; that the applicant, who admitted having sex with both girls, seemed proud that he "opened" the girl who was a virgin, and that he "dirtied" the inside of the girl when he was first entering her; that the applicant said they had fun; and, that the applicant took part of the

property stolen from the murdered girls (R. XXIX – 393-4, 397-401, 405, 422, 424-5) (R. XXX – 477-8, 533-4).

35. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was suspended from school at the age of fourteen in 1990; that he was placed in an alternative school for repeated misbehavior and misconduct; and, that he was not able to function at the alternative school and was expelled from the school district for the remainder of the school year (R. XXXIV – 76-8).

36. The Court finds that, during the punishment phase of the applicant's trial, the State further presented evidence that the applicant called a female teacher a whore, used profanity and defied the rules (R. XXXIV – 7-13).

37. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant made threats of physical violence toward two adult principals when the applicant was a sixteen-year old student in 1992; that he was confrontational, aggressive, and physically resisted the principals when they attempted to calm the applicant; that he screamed profanities at another student; and, that the applicant stated that life did not mean anything to him; he would be on television or in the newspaper for killing someone and jail did not scare him (R. XXXIV – 17-64).

38. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant had been suspended several times from school by 1992; that he was expelled from school after being in a gang-related fight; and, that the applicant never

altered his behavior while attending school before he was permanently removed (R. XXXIV – 64-9).

39. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was referred as a juvenile on a weapons charge after he was detained as a result of an auto theft and after he was found in possession of a .38 revolver on January 4, 1992 (R. XXIV – 110-54), and that the applicant was charged with the offense of carrying a weapon on July 18, 1992, after a .38 weapon was found partially under the applicant's car seat on the floorboard of the car next to two live rounds of .38 SP ammunition, a more powerful round than a normal .38 round (R. XXXIV – 179-81)

40. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the police talked to the applicant outside of the emergency room at Memorial Northwest Hospital after the applicant and Peter Cantu accompanied the gunshot Efrain Perez to the hospital on June 6, 1993; that the applicant and Cantu were uncooperative, belligerent, abusive, sarcastic and vulgar; and, that the applicant changed his story concerning the shooting several times (R. XXXIV – 197, 216-8).

41. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that a shank was found during a search of the applicant's one-man cell in the Harris County Jail on July 1, 1993 (R. XXXIV – 84-90), and that an L-shaped metal pipe, capable of causing serious bodily injury and death, with a sharpened end was also found in the mattress in the applicant's lock-down cell (R. XXXIV – 225-7).

42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.

43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's expected behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

Second Ground – ineffective assistance of counsel re parole eligibility instruction:

44. The Court finds that, during the applicant's trial, trial counsel stated that counsel did not want the trial court to inform the jury of the applicant's parole eligibility in the event of a life sentence because counsel's previous experience in capital cases showed that polled jurors thought that a life sentence was truly a life sentence (R. V. XXVII – 12-3).

45. The Court finds that the issue of parole eligibility was not a matter for the jury's consideration at the time of the applicant's September, 1994 capital murder trial, and the trial court was not required to instruct the jury concerning parole eligibility in a capital case. *Martinez v. State*, 924 S.W.2d 693 (Tex. Crim. App. 1996);

Rhoades v. State, 934 S.W.2d 113 (Tex. Crim. App. 1996) (citing *Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

Third Ground – Vienna Convention:

46. The Court finds that the applicant did not object pre-trial or during trial to any violation of the Vienna Convention on Consular Relations which grants a foreign national who has been arrested, imprisoned or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of this right "without delay." Vienna Convention, art. 36(1)(b), 21 U.S.T. at 100-101; 595 U.N.T.S. at 292.

47. The Court finds that testimony during the applicant's trial and the applicant's statement reflect that the applicant was born in Mexico, but lived most of his life in the United States; that he spoke, read and wrote the English language; that he attended Houston public schools beginning with elementary school; that he initially did well in elementary school; that his family and friends lived in the United States; that his father had been gainfully employed since his arrival in the United States; that his mother was presently employed; and that the applicant had been employed in the United States while going to Houston schools (R. XXXV – 279-92) (R. XXX – 652, 670).

48. The Court finds that the applicant's father testified that they had lived in the United States for fifteen years and that both he and the applicant's mother had a "green card" (R. XXXV – 279-80, 288).

49. The Court finds that the applicant's school records contain the notation "516396627" under social security number for the applicant.

50. The Court finds, based on the appellate record, that there was no testimony presented during the applicant's trial that he was not a United States citizen; that the applicant told anyone during his detention that he was a Mexican national; that he requested assistance from the Mexican consulate; or, that he was prevented from requesting assistance from the Mexican consulate.

51. The Court finds that it is a reasonable inference that the applicant was familiar with the laws and procedures of the country and state in which he had lived almost his entire life and that the applicant was familiar with the criminal justice system based on his prior criminal history.

52. The Court finds that the applicant was informed of his *Miranda* rights prior to giving a statement admitting participation in the offense (R. XXX – 633-40) (R. XXXII – 942-5).

53. The Court finds that the Court of Criminal Appeals has held that a defendant does not have standing to advance a claim that his death sentence violated the United Nations Charter, stating that " . . . treaties operate as contracts among nations. Therefore, it is the offended nation, not an individual, that must seek redress for a violation of sovereign interests." *Hinojosa v. State,* No. 72,932 (Tex. Crim. App. Oct. 27, 1999).

54. The Court finds that the Court of Criminal Appeals has also held that treaties do not constitute "laws" for the purposes of TEX. CODE CRIM. PROC. art. 38.23;

specifically, that "the Vienna Convention Treaty illustrates well the proposition that Article 38.23 is not a suitable enforcement mechanism for international treaties." *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000).

55. The Court finds that federal courts have found that a violation of the provisions of the Vienna Convention will not require reversal of a criminal conviction or other judgment, in the absence of a showing that the defendant was actually harmed by the violation. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 487 (1997); *United States v. $69,530.00 in United States Currency*, 22 F.Supp.2d 593, 595 (W.D.Tex. 1998).

Fifth Ground – Brady issue:

56. The Court finds that, during the guilt-innocence phase of the applicant's trial, the State presented testimony from Joe Cantu, the brother of the applicant's co-defendant Peter Cantu, and from Christina Cantu, Joe Cantu's wife, about the admissions the applicant made concerning his part in the capital murder (R. XXIX – 366-373, 383-425) (R. XXX – 490-540).

57. The Court finds, according to the credible affidavit of Gail Hays, Harris County District Attorney's Office Investigator, that Hays was assigned as an investigator to the 263rd District Court during 1994; that Assistant District Attorney Marie Munier was the chief of the 263rd District Court and was the prosecutor in the trial of the applicant's co-defendant Efrain Perez at that time; that Hays talked with witnesses Christina and Joe Cantu; that Hays made no deals or agreements with Christina and Joe Cantu in exchange for their cooperation or testimony as

witnesses; that Hays did not promise the Cantus any reward money in exchange for their cooperation or testimony; and, that Hays did not promise "protection" to either Christina or Joe Cantu.

58. The Court further finds, according to the credible affidavit of Gail Hays, that Hays was aware that Christina Cantu was pregnant, but Hays was not aware of any miscarriage and was never informed of any alleged beating of Christina Cantu; that Hays became aware that Joe Cantu had been arrested prior to trial when Christina Cantu telephoned Hays and gave her such information; that Hays' understanding was that Joe Cantu made a statement about "blowing up" his place of employment after having an argument at work and Joe Cantu was subsequently arrested; that Hays informed Assistant District Attorney Marie Munier of Joe Cantu's arrest either the night Hays learned he had been arrested or the next business day; that Hays had no knowledge of any events concerning Joe Cantu's arrest after that time; that Hays did not recommend a lawyer or give any lawyer's name to either Joe or Christina Cantu; that Hays made no promises concerning Joe Cantu's case; and, that Hays was not aware of the disposition of Joe Cantu's arrest until December, 1999.

59. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Marie Munier, the prosecutor in the case of the applicant's co-defendant Efrain Perez, that Munier learned that Joe Cantu had been arrested prior to trial; that Munier has no specific recollection of informing Assistant District Attorneys Mark Vinson or Terry Wilson of Joe Cantu's arrest; that Munier made no deals or agreements with Joe or Christina Cantu involving their testimony in the trials or

involving Joe Cantu's arrest; that Munier took no action involving Joe Cantu's arrest or the disposition of his case; that Munier was aware that Joe Cantu's case was dismissed prior to the trials of the applicant and co-defendant Efrain Perez; that Munier made no promises or assurances to either Joe or Christina Cantu concerning any reward money in exchange for their cooperation or testimony; Munier was aware that Christina Cantu was pregnant, but Munier was not aware of any miscarriage; and, that Munier was never told of any alleged beating of Christina Cantu.

60. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Mark Vinson, the prosecutor in the applicant's capital murder trial, that, Vinson did not make any deals or agreements with Joe or Christina Cantu involving their testimony in the trials; that Vinson did not promise or assure either Joe or Christina Cantu that they would receive any reward money in exchange for their cooperation and testimony; that Vinson has no specific recollection of being aware of either Joe Cantu's 1994 arrest for a misdemeanor offense or the disposition of Joe Cantu's case; that Vinson had nothing to do with the disposition of Joe Cantu's case; that Vinson has a slight recollection of being aware that Christina Cantu was pregnant, but he was never aware of any miscarriage; and, that Vinson was never told of any alleged beating of Christina Cantu.

61. The Court finds, based on official court records, that a complaint against Joe Cantu for the misdemeanor offense of terroristic threat, cause no. 9425339, Harris County Court at Law # 13, was dismissed on August 4, 1994, based on insufficient evidence; that trial testimony began in the applicant's case on September 12, 1994 (R.

XXVIII – 34); and, that Joe Cantu testified in the applicant's case on September 14, 1994 (R. XXX – 490-577). *See attached complaint and motion to dismiss, cause no. 9425339.*

62. The Court finds, based on the credible affidavit of Harris County Assistant District Attorney Joni Vollman, that Vollman was the chief prosecutor in Harris County Court at Law #13 in August, 1994; that Vollman signed the motion to dismiss contained in the clerk's file in the State of Texas v. Joe Cantu, cause no. 9425339, in which Cantu was charged with the misdemeanor offense of terroristic threat; that Vollman has no specific recollection as to the facts of the case in cause no. 9425339; that Vollman had some awareness that Joe Cantu was related to the defendant Peter Cantu, one of the defendant's in Elizabeth Pena and Jennifer Ertman's murders; that Vollman's vague awareness about this relationship did not influence Vollman's dismissal of the charges against Joe Cantu in cause no. 9425339; that Vollman would have specifically remembered if anyone in the Harris County District Attorney's Office had approached her, requesting, suggesting, or ordering that charges be dismissed against Joe Cantu; that Vollman states with certainty that she has no such recollection; and, that the charges against Joe Cantu in cause no. 9425339 were dismissed based on insufficient evidence. *See attached March 1, 2000 affidavit of Joni Vollman.*

CONCLUSIONS OF LAW

First Ground – ineffective assistance of appellate counsel re Batson claim: Fourth Ground - Batson issue:

1. The trial court properly found that the State's explanations that the State exercised a peremptory strike

against prospective juror Elizabeth Berry based on her two brother's criminal history, including one of the brother's being on parole and the other brother being incarcerated, and based on Berry's perception of the applicant being the underdog and the prosecutor being the attacker were racially neutral explanations logically related to the instant case. *See Harris v. State*, 827 S.W.2d 945, 955 (Tex. Crim. App. 1992) (holding that prosecutor's explanation in capital case that he struck venireperson because her brother was on probation for burglary was racially neutral).

2. The trial court properly found that the State's explanation that the State struck prospective juror Rafael Rodriguez, in part, because the State still did not have a full understanding of Rodriguez's position on the death penalty is supported by the ambiguity of Rodriguez's cited voir dire statements about the death penalty, and the State's explanation that the State feared that Rodriguez believed in "turning the other cheek" was a racially neutral explanation which does not violate the precepts of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *see Cantu v. State*, 842 S.W.2d 667, 688-9 (Tex. Crim. App. 1992) (holding that trial court's finding that prosecutor's reasons for striking prospective juror were racially neutral where prosecutor stated that strike was based, in part, on prospective juror's volunteer work indicating that she would be "kind-hearted"); *see also Lewis v. State*, 911 S.W.2d 1, 4 (Tex. Crim. App. 1995) (holding that prosecutor could exercise peremptory strikes against two prospective jurors who were not in favor of death penalty as long as strikes not made in racially discriminatory manner).

3. The applicant, in his written motion to strike the jury panel, fails to establish a *prima facie* case of

purposeful discrimination in the State's peremptory strikes. *Harris*, 827 S.W.2d at 955 (holding that defendant, in order to establish *prima facie* case, may rely on fact that peremptories constitute jury selection practice that allows those to discriminate who are of mind to discriminate, and defendant must show this fact and other relevant circumstances raise inference that peremptories were exercised to exclude prospective jurors on basis of race).

4. In the alternative, the trial court properly found that the State's explanations for striking specific jurors were racially neutral. *Wheatfall v. State*, 882 S.W.2d 829, 835 (Tex. Crim. App. 1994) (holding State has burden to present neutral explanation for strike); *see also Trevino v. State*, 864 S.W.2d 499, 500 (Tex. Crim. App. 1993) (holding State's explanation for strike does not have to rise to level needed to justify challenge for cause).

5. The applicant fails to show that the trial court's decision that the State's strikes were racially neutral was clearly erroneous. *Id.* (holding appellate court may not reverse trial court's decision that State's strike is racially neutral unless trial court's decision is clearly erroneous and trial court's choice of interpretation may not be found to be clearly erroneous when evidence is susceptible to two reasonable interpretations and trial court's decision is in accord with one of these two interpretations).

6. The applicant fails to show that the trial court erred in allegedly failing to grant a *Batson* hearing, and the applicant fails to show that his rights under the equal protection clause, U.S. CONST. amend. XIV, were violated.

7. The applicant fails to show that appellate counsel is ineffective for not presenting on direct appeal the claim that the trial court allegedly erred in finding that the

State gave race neutral reasons for peremptory strikes and in allegedly not granting a *Batson* hearing. The applicant fails to show that, but for appellate counsel's alleged error, the results of the proceeding would have been different. *Ex parte Butler,* 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (holding that *Strickland* standard applies to appellate counsel as well as trial counsel).

First Ground – ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty:

8. The applicant fails to show that appellate counsel is ineffective for not advancing the meritless claim that the trial court allegedly erred in orally denying the applicant's Motion to Preclude State from Seeking the Death Penalty when the trial court allegedly granted the same written motion. *See Butler,* 884 S.W.2d at 783; *see also Kinnamon v. State,* 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (counsel not ineffective for failing to request jury charge on lesser-included of murder when the evidence did not support such charge).

Second Ground – ineffective assistance of counsel re contacting probation officer:

9. The applicant fails to show deficient performance, much less harm, in trial counsel's not contacting probation officer Guerra and not presenting punishment evidence that the applicant was allegedly punctual for appointments with his probation officer and that the applicant allegedly presented no problems for his probation officer, in light of the overwhelming evidence of the brutality of the applicant's crime, the applicant's past illegal activities, and the applicant's inability to function in the structured

environments of school and jail. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

Second Ground – ineffective assistance of counsel re parole eligibility instruction:

10. The trial court properly did not instruct the jury as to parole eligibility and defense counsel properly did not voir dire on the issue of parole eligibility. *See Martinez v. State,* 924 S.W.2d 693 (Tex. Crim. App. 1996) (holding issue of parole eligibility not a matter for jury's consideration in capital murder trial); *Rhoades v. State,* 934 S.W.2d 113 (Tex. Crim. App. 1996) (citing *Smith v. State,* 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

11. Trial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of forty-three. *Ex parte Ewing,* 570 S.W.2d 941 (Tex. Crim. App. 1978) (appellate court will review trial strategy only when it is without a plausible basis).

12. The applicant fails to show deficient performance, much less harm, based on trial counsels' reasonable trial strategy of not informing the jury concerning parole eligibility; thus, the applicant fails to show that his rights, pursuant to U.S. CONST. Amends. VI and XIV, were violated.

Third Ground – Vienna Convention:

13. Based on the applicant's lack of objection at trial to the alleged failure to inform him of his rights under the

Vienna Convention, the applicant is procedurally barred from presenting his habeas claim that the alleged violation of the Vienna Convention violated his constitutional rights. *Hodge v. State,* 631 S.W.2d 754, 757 (Tex. Crim. App. 1982); *Williams v. State,* 549 S.W.2d 183, 187 (Tex. Crim. App. 1977).

14. In the alternative, the applicant fails to show foreign nationality which requires notification of a foreign consulate when a "national" of the "sending state" is detained in custody. *See Maldonado v. State,* 998 S.W.2d 239, 246-7 (Tex. Crim. App. 1999) (holding that defendant not entitled to art. 38.23 instruction where defendant not informed of his right to consult consulate but evidence showed that defendant lived in United States many years, spoke English, had Texas driver's license, and bought car in United States and evidence did not show that defendant was a Mexican citizen).

15. In the alternative, the applicant, as a private individual, lacks standing to enforce the provisions of the Vienna Convention. *Hinojosa v. State,* No. 72,932 (Tex. Crim. App. Oct. 27, 1999) (holding that treaties operate as contracts among nations; thus, offended nation, not individual, must seek redress for violation of sovereign interests).

16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the applicant's constitutional rights were safeguarded. *See and cf. Rocha v. State,* 16 S.W.3d 1, 19 (Tex. Crim. App. 2000) (holding that treaties do not constitute "laws" for purpose of TEX.

CODE CRIM. PROC. art. 38.23, and Vienna Convention Treaty illustrates proposition that art. 38.23 is not suitable enforcement mechanism for international treaties).

17. The applicant fails to show that his rights, pursuant to U.S. CONST. amends. V, VI, and XIV, were violated and fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex paste Barber,* 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment).

Fifth Ground – Brady issue:

18. The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina Cantu in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375 (1985) (holding evidence is material where there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was denied due process under U.S. CONST. amend. XIV and TEX. CONST. art. 1, § 10.

19. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is

recommended to the Texas Court of Criminal Appeals that relief be denied.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 675430-A.

Signed this 22nd day of January, 2001.

CAPRICE COSPER

CAPRICE COSPER
Presiding Judge
339th District Court

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. 50,191-01

EX PARTE JOSE ERNESTO MEDELLIN

HABEAS CORPUS APPLICATION
FROM HARRIS COUNTY

The order was entered per curiam.

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Art. 11.071, V.A.C.C.P.

On September 16, 1994, a jury found applicant guilty of capital murder. The jury returned answers to the punishment phase special issues and the trial court assessed punishment at death. This Court affirmed applicant's conviction on direct appeal. Medellin v. State. No. 71,977 (Tex.Cr.App. delivered March 19, 1997).

In the instant cause, applicant presents five allegations challenging the validity of his conviction and resulting sentence. The trial court has entered findings of facts and conclusions of law recommending the relief sought be denied.

This Court has reviewed the record. The trial court's findings and conclusions are supported by the record and

upon such basis the relief sought by the applicant is denied.

IT IT SO ORDERED THIS 3RD DAY OF OCTOBER, 2001.

Do Not Publish

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-4078

JOSE ERNESTO MEDELLIN,

Petitioner,

– v. –

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

ORDER

Petitioner Jose Ernesto Medellin ("Medellin") filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his capital conviction and death sentence. (Docket Entry # 12). Pending before the Court is Respondent Janie Cockrell's ("Respondent") motion for summary judgment. (Docket Entry # 16). Having considered the record, the pleadings, and the applicable law, particularly the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the Court **grants** respondent's motion for summary judgment, **denies** Medellin's petition, and **denies** a Certificate of Appealability.

BACKGROUND

On September 23, 1993, a Texas grand jury indicted Medellin for his role in the capital murder of Elizabeth Pena. The evidence in the guilt/innocence phase of trial showed that on June 24, 1993, Medellin and his fellow gang members raped and killed sixteen-year-old Elizabeth Pena and her fourteen-year-old friend, Jennifer Ertman. The evidence at trial, briefly summarized, showed that, after participating in a gang initiation, Medellin and other gang members encountered the victims walking along railroad tracks at approximately 11:30 p.m. Over the next hour, the gang repeatedly and viciously raped the two girls. The testimony at trial established that Medellin participated in the rape of both victims. The gang members then strangled the two girls to death. Trial testimony established that Medellin helped strangle Elizabeth Pena with one of his shoestrings. In describing the attacks later, Medellin appeared "hyper, giggling and laughing" as he recounted his role. Medellin also bragged about deflowering one of the young girls. The only remorse Medellin showed was that he did not have a gun so that the killing would have been quicker.[1]

The jury found Medellin guilty of capital murder.[2] In a separate punishment phase, the State presented evidence

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[1] Medellin confessed to his participation in the rape and murder of the two girls. Medellin's confession portrays a more limited involvement in the crimes than he bragged about immediately after the killings. Medellin's confession, however, indicates that he participated in the rape of Elizabeth Pena and then helped another gang member strangle her.

[2] The State indicted Medellin under three different theories: capital murder of Elizabeth Pena in the course of a kidnaping; capital murder of Elizabeth Pena in the course of a robbery; and capital murder of Elizabeth Pena in the course of aggravated sexual assault. Tr. Vol. I at 6. The jury instructions provided for his conviction under any of those theories. Tr. Vol. I at 285-86. The jury returned a general verdict of guilty without specifying under which theory it convicted Medellin. Tr. Vol. I at 294.

of Medellin's violent character and criminal offenses. Medellin had a long history of violent threats and misbehavior, often associated with the possession of firearms. The State also presented evidence that Medellin had been discovered with a "shank" in his cell while incarcerated pending trial. The defense's punishment phase case focused on testimony that Medellin had a good character and on an expert's opinion that he would not be a future danger to society. The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

The Court of Criminal Appeals denied Medellin's direct appeal from his conviction and sentence on March 19, 1997. *Medellin v. State*, No. 71, 997 (Tex. Crim. App. Mar. 19, 1997) (unpublished). Medellin did not seek *certiorari* review in the United States Supreme Court.

Medellin filed a state application for habeas corpus relief. The trial habeas court held that no controverted, previously unresolved issues existed and found it unnecessary to hold an evidentiary hearing. State Habeas Record at 177.[3] On January 22, 2001, the trial court signed the State's proposed findings and conclusions recommending that habeas relief be denied. State Habeas Record at 198-218. The Court of Criminal Appeals found that the record supported the lower court's findings and conclusions and, on that basis, denied relief. *Ex parte Medellin*, No. 50, 191-01 (Tex. Crim. App. Oct. 3, 2001).

On November 28, 2001, Medellin filed a preliminary federal petition for a writ of habeas corpus through appointed counsel. (Docket Entry # 5). On July 18, 2002,

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[3] Judge Caprice Cosper presided over Medellin's trial and his state habeas proceedings.

Medellin amended his habeas petition. (Docket Entry # 12). Medellin's amended petition raises five grounds for habeas relief:

1. Medellin's Sixth Amendment right to effective assistance of counsel was violated by trial counsel's[4] failure to present evidence of his good behavior while on juvenile probation, trial counsel's failure to present evidence of the parole eligibility accompanying a life sentence, and appellate counsel's[5] failure to seek enforcement of a trial court order allegedly precluding the State from seeking a death sentence;

2. The State violated Medellin's rights under the Vienna Convention by not protecting his right to consular access;

3. The State violated the Fourteenth Amendment by exercising its peremptory challenges in a discriminatory manner;

4. The State failed to disclose material exculpatory information to the defense; and

5. The trial court denied Medellin an impartial jury by excluding a potential juror for her opposition to capital punishment.

Respondent seeks summary judgment on the merits of Medellin's claims. (Docket Entry # 16). Medellin has filed a response to the summary judgment motion. (Docket Entry # 24).

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[4] Jack Millin and Linda Mazzagatti represented Medellin at trial. For the sake of clarity, the Court will generally refer to these attorneys conjunctively as "trial counsel."

[5] Randy McDonald represented Medellin on appeal. This Court will refer to him as "appellate counsel."

STANDARDS OF REVIEW

Respondent seeks summary judgment in this case. In ordinary civil cases, summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56(c); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747 (5th Cir. 1996). A petition for writ of habeas corpus is a civil action in federal court. *See Archer v. Lynaugh*, 821 F.2d 1094, 1096 (5th Cir. 1987). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). However, "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules." *Woodford v. Garceau*, ___ U.S. ___, 123 S. Ct. 1398, 1402 (2003); *see also* Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. In habeas proceedings, a court's summary judgment review is circumscribed by the AEDPA. *See Proctor v. Cockrell*, 283 F.3d 726, 729-30 (5th Cir. 2002).

The intent of the AEDPA is "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002); *see also Woodford* ___ U.S. at ___, 123 S. Ct. at 1401 ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."). The AEDPA "embodies the principles of federalism, comity, and finality of judgments," *Evans v. Cockrell*, 285 F.3d 370, 374 (5th Cir. 2002), "substantially restrict[ing] the scope of federal review of state criminal court proceedings." *Montoya v.*

Johnson, 226 F.3d 399,404 (5th Cir. 2000), *cert. denied*, 532 U.S. 1067 (2001); *see also Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360 (2002) ("[Section] 2254(d)'s highly deferential standard for evaluating state-court rulings . . . demands that state court decisions be given the benefit of the doubt."). In essence, the "AEDPA was enacted, at least in part, to ensure comity, finality, and deference to state court habeas determinations by limiting the scope of collateral review and raising the standard for federal habeas relief." *Robertson v. Cockrell*, 324 F.3d 297, 306 (5th Cir. 2003).

The AEDPA provides that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). Deference under the AEDPA differs depending on whether the state court engaged in a legal, factual, or mixed inquiry. *See Gachot v. Stalder*, 298 F.3d 414, 417-18 (5th Cir. 2002).

Federal courts analyze questions of law and mixed questions of law and fact under 28 U.S.C. § 2254(d)(1) to determine whether the state court decision was either "contrary to" or an "unreasonable application" of Supreme Court precedent. *See DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002); *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). The Supreme Court

holds that a state court decision is "contrary to" federal precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Bell*, 535 U.S. at 698; *Early v. Packer*, ___ U.S. ___, 123 S. Ct. 362, 365 (2002). A state court may unreasonably apply federal law if it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.[6]

A federal habeas court's review under 28 U.S.C. § 2254(d) "should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 963 (2003). In reviewing the state court's substantive decision under the AEDPA,

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[6] An unreasonable application of federal law "is different from an *incorrect* application of federal law." *Id.* at 410. To provide relief, a federal habeas court must not only conclude that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *see also Woodford*, ___ U.S. at ___, 123 S. Ct. at 361 (differentiating between an incorrect state determination and an "unreasonable application of federal law"); *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001) ("Thus, a state court application may be incorrect in our independent judgment and, yet, reasonable."), *cert. denied*, ___ U.S. ___, 123 S. Ct. 106 (2002).

this court focuses on "'determining the reasonableness of the state court's 'decision,' . . . not grading their papers.'" *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001) (quoting *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cr. 2001)), *cert. denied,* 535 U.S. 982 (2002); *cf. Dillard v. Blackburn,* 780 F.2d 509, 513 (5th Cir. 1986) (observing that "federal courts do not sit as courts of appeal and error for state court convictions"). Thus, this Court bases its analysis on "the state court's ultimate conclusion, not on its reasoning process." *DiLosa*, 279 F.3d at 262; *Neal,* 286 F.3d at 246.

The AEDPA affords deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell,* ___ U.S. ___, 123 S. Ct. 1029, 1043 (2003). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El,* ___ U.S. at ___, 123 S. Ct. At 1036.[7]

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[7] The AEDPA also established strict standards limiting the availability of evidentiary hearings in federal court. *See* 28 U.S.C. § 2254(e)(2). Medellin requests a hearing but has not shown that such a hearing is necessary to the adjudication of his claims. As the availability of an evidentiary hearing is within the discretion of this Court, *see Williams v. Taylor,* 529 U.S. 420, 436 (2000) (stating that it was "Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus"), Rule 8 of the Rules Governing Section 2254 Cases ("If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require."), this Court holds that there is no need for an evidentiary hearing in this case.

Notwithstanding a petitioner's ability to show that a state court decision is erroneous under 28 U.S.C. § 2254(d), that does not guarantee that a petitioner is entitled to habeas relief. The language of 28 U.S.C. § 2254(d) "does not *require* federal habeas courts to grant relief reflexively." *Robertson*, 324 F. 3d at 306; *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) (finding that 28 U.S.C. § 2254(d) does not entitle a petitioner to habeas relief). No Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a petitioner satisfies the AEDPA standard[.]" *Horn v. Banks*, 536 U.S. 266, 272 (5th Cir. 2002). A habeas corpus petitioner meeting his burden under 28 U.S.C. § 2254(d) must still comply with 28 U.S.C. § 2254(a): he must show that "he is in custody in violation of the Constitution or law and treaties of the United States." This includes a showing that any constitutional error at trial "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)); *see also Aleman*, 320 F.3d at 690 ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome"). Habeas relief is also unavailable if it would require the creation of a new constitutional rule. *See Horn*, ___ U.S. at ___, 122 S. Ct. at 2151 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).

ANALYSIS OF THE CASE

I. Effective Assistance of Counsel

Medellin raises three claims criticizing his trial and appellate legal representation. Medellin first argues that

trial counsel's representation in the punishment phase fell below constitutional norms when counsel failed to present evidence of his good probation history. Also, Medellin faults trial counsel for not alerting the jury to the fact that he would not be eligible for parole for at least thirty-five years if given a life sentence. Medellin finally faults appellate counsel for not seeking enforcement of an apparently erroneous order precluding the State from seeking the death penalty. The Texas courts rejected each of those claims. This Court will consider their merits under the relevant legal standards.

A. *Strickland standard*

The proper standard for evaluating the effectiveness of counsel is reasonable performance under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). In *Strickland*, the Supreme Court established a two-prong test for resolving ineffective assistance claims. Under that test, a defendant must show that counsel's performance was deficient and prejudicial to the defense. *Id.* at 687. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. Both the performance and prejudice components of the ineffective assistance of counsel inquiry are mixed questions of law and fact. *See Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994).

To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In reviewing ineffectiveness claims "judicial scrutiny of

counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* at 689.

A petitioner must also show that counsel's deficient performance resulted in a reasonable probability of a different result. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *See id.* However, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993). Thus, in addition to establishing a reasonable probability of a different result, a petitioner must demonstrate that counsel's deficient performance rendered the result of the proceeding fundamentally unfair or unreliable. *See Vuong v. Scott,* 62 F.3d 673, 685 (5th Cir.) (citing *Lockhart,* 506 U.S. at 372), *cert. denied,* 516 U.S. 1005 (1995).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is on the petitioner. *See Montoya,* 226 F.3d at 408; *Jernigan v. Collins,* 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied,* 508 U.S. 978 (1993). A petitioner's conclusory and speculative allegations will not suffice in this regard. *See Kinnamon v. Scott,* 40 F.3d 731, 734-35 (5th Cir.), *cert. denied,* 513 U.S. 1054 (1994); *Barnard v. Collins,* 958 F.2d 634, 643 n.11 (5th Cir. 1992), *cert. denied,* 506 U.S. 1057 (1993). The Fifth Circuit has cautioned that

> [a] claim of ineffective assistance of counsel must be judged with eyes directly upon the reality of the situation facing defense counsel at the time of the acts and not years later. This discipline best assures faithful application of the objective measure of whether the decisions of defense

> counsel are within the range of those a reasonably competent lawyer might have made under those same facts and circumstances. It also takes us far along in judging its prejudice, if that inquiry is required.

Black v. Cockrell, 314 F.3d 752, 754-55 (5th Cir. 2002), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 2003 WL 1235155 (April 21, 2003).[*] The Court will apply the above-stated standards to Medellin's ineffective-assistance-of-counsel claims.

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[*] The Fifth Circuit's language echos [sic] the *Strickland* decision:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
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> * * *
>
> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . [T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 689-90; *see also Williams v. Collins*, 16 F.3d 626, 631 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994).

B. *Failure to present evidence of good behavior while on juvenile probation*

During the punishment phase, trial counsel called several witnesses to present testimony that would support a life sentence. These witnesses included former employers, friends, and family members. Medellin also called a psychologist whose testimony suggested that Medellin would not be a future danger to society. Medellin now argues that trial counsel provided ineffective assistance by not calling his former juvenile probation officer as a witness. Medellin contends that trial counsel should have presented his probation officer's testimony to show that he would not be a danger when placed under supervision, thus encouraging the jury to answer the special issues in a manner favoring a life sentence.

Medellin fails to support this claim with competent evidence. Claims of uncalled witnesses are not favored on habeas review because they are "largely speculative." *Evans,* 285 F.3d at 377. A petitioner raising such claims generally leaves a court to speculate on the exact nature of an uncalled witness' putative testimony. Here, Medellin has failed to provide this Court with any reliable indication of what testimony Medellin's former probation officer would have given if called as a witness. Medellin relies on an affidavit from his state habeas investigator stating that his probation officer, Maria Guerra, told her that Medellin "came on time" and that she "never had a problem" with him. (Docket Entry # 12, Exhibit F). Essentially, Ms. Guerra allegedly told the investigator that Medellin "did what he was supposed to do." (Docket Entry # 12, Exhibit F). What Medellin's former probation officer allegedly told his habeas investigator is hearsay, and Medellin has not shown that it falls under any exception to the hearsay

rule. *Cf.* FED R. EVID. 802; *see also Herrera v. Collins,* 506 U.S. 390, 417-18 (1993) (holding on the facts of the case that affidavits containing hearsay statements obtained eight years after the habeas petitioner's trial were not sufficient to grant habeas relief). Absent the hearsay statements in his investigator's affidavit, this Court is left with nothing but speculation concerning what a former probation officer may have added to Medellin's defense. This claim could be rejected on that basis alone.

Even assuming that the hearsay statements are reliable, Medellin fails to show an entitlement to habeas relief. The state habeas court issued several factual findings commenting on the potential impact of the putative evidence:

> 42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.
>
> 43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

State Habeas Record at 207, ¶¶42, 43. The state habeas court concluded that the absence of the probation evidence did not meet either prong of the *Strickland* analysis. State Habeas Record at 215, ¶9. That decision was neither contrary to, nor an unreasonable application of, federal law.

Trial evidence portrayed Medellin as an extremely violent and depraved individual. The State presented extensive evidence that Medellin consistently broke the law, often in a violent manner. Medellin participated in the brutal gang rape and murder of two young girls. As noted by the Court of Criminal Appeals on direct review, "[t]he facts of the case are brutal and barbaric enough to alone support the jury's answer to the [future dangerous] special issue." Opinion on Direct Review ("Opinion") at 7. The mere fact that Medellin was prompt at his probation appointments and never caused his probation officer problems would not overcome the substantial, nearly overwhelming, evidence of his future dangerousness.

The punishment phase evidence rebuts Medellin's insistence that the probation officer's testimony could have shown that he would not be a threat in a structured environment. The State presented evidence that, while incarcerated pending trial, Medellin secreted weapons in his cell. Medellin's own actions refute any inference that he would not be violent in prison. In light of the depraved nature of the offense, his highly violent character, and his poor behavior while incarcerated, the fact that Medellin was not tardy at his probation meetings does not create a reasonable probability that the jury would not find him to be a future danger. The state court's decision was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

C. *Failure to emphasize the parole eligibility accompanying a life sentence*

Medellin also faults counsel for not making the jury aware, either through voir dire questioning or through a jury instruction, that Texas law provided for parole only after thirty-five years incarceration if the jury returned a life sentence. The trial court indicated to the defense that it would be willing to allow parole eligibility information to come before the jury. Tr. Vol. 27 at 12. Trial counsel Ms. Mazzagatti told that court that her co-counsel Mr. Millin

> has already articulated to the Court his reasons for not wanting to pursue the basis of informing the jurors of the 35 years because he had previously, based on his experience in six other capital murder trials, polled jurors and found that they believe that it was truly a life sentence. And so he thought as a strategy he would not proceed with the advising people on the 35 years.

Tr. Vol. 27 at 12-13. Medellin now argues that trial counsel's failure to present evidence of parole eligibility meets both prongs of the *Strickland* analysis.

The state habeas court held that trial counsel made a strategic decision not to inform the jury about parole eligibility. The state habeas court concluded that "[t]rial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of

forty-three." State Habeas Record at 215-16, ¶ 11.[9] The state habeas court's decision was not contrary to, or an unreasonable application of, federal law.

Trial counsel apparently hoped to leave the jury with the impression that a life sentence meant just that – lifelong incarceration. The integrity of trial counsel's choice is reflected in concerns raised by the Fifth Circuit in other cases: that a jury's knowledge that the defendant could one day return to society may "'predispose[] them to impose a death penalty.'" *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir.) (quoting *King v. Lynaugh*, 850 F.2d 1055, 1060 (5th Cir. 1988)), *cert. denied*, 519 U.S. 854 (1996). Indeed, as noted by the Fifth Circuit in another case, the petitioner's

> crime, and his revelry in it, leave no room for hypothesizing that a jury, faced with the information about parole for which [the petitioner] contends, would have been more lenient. If anything, given the egregious nature of this case, a suggestion to prospective jurors that [the petitioner] might return to society in [thirty-five] years could very easily have predisposed them to impose a death sentence.

King, 850 F.2d at 1061. This concern is amplified in this case due to Medellin's youth at the time of the murders. Trial counsel made a choice not to risk the chance that a jury would not view thirty-five years as an appropriate

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[9] The Court notes that the state habeas court erred in its mathematical computation of at what age Medellin would be eligible for parole. Nonetheless, the same principle applies whether Medellin would be released in his forties or his fifties – he could still commit a violent crime.

amount of time before parole, and thus return a death sentence.

The Supreme Court has recognized that "[i]n a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole." *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994). Trial counsel based his decision not to inform the jury of parole eligibility on his prior experience and on objectively defensible strategy. As Medellin failed to show that the state habeas court's decision was contrary to or an unreasonable application of federal law, this claim is denied. *See* 28 U.S.C. § 2254(d)(1).[10]

D. *Failure to seek enforcement on appeal of the trial court's order allegedly precluding the State from seeking a death sentence*

Prior to trial, Medellin filed a "Motion to Preclude Prosecution from Seeking the Death Penalty." Tr. Vol. I at 95-107. Medellin's motion argued that Texas should not be permitted to seek the death penalty against him because

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[10] The state habeas court also found that Medellin failed to show that he was prejudiced by trial counsel's failure to offer evidence or question about parole eligibility. State Habeas Record at 216, ¶ 12. Medellin's response to the summary judgment motion relies on studies showing that a jury's correct knowledge of parole eligibility increases the likelihood of them imposing a life sentence. Considering the overwhelming evidence that supported a death sentence in this case, and the brutal nature of the murders, there is no reasonable probability that a jury would return a life sentence had it known about the lengthy time before Medellin would be eligible for parole.

of various perceived deficiencies in the capital sentencing statute. On September 9, 1994, the trial court held a hearing to address various pre-trial motions. There, the following interchange occurred:

> Trial counsel: Your Honor, could we start with the Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude the Imposition of the Death Penalty because these will probably be –
>
> Trial court: That will be denied. All right. What else?
>
> Trial counsel: Then the next one, Your Honor, will be the Motion to Preclude the Prosecution from Seeking the Death Penalty.
>
> Trial court: That will be denied.

Tr. Vol. 27 at 9. When the trial court signed the defense's proposed order that day, however, the trial judge initialed the line indicating that the motion to preclude the death penalty had been granted. Tr. Vol. I at 108. Neither trial nor appellate counsel seized on the written order as an opportunity to avoid a capital conviction.

Medellin argues that the written order of the trial court was enforceable and should have prevented his capital prosecution. Medellin faults his appellate counsel for not identifying the existence of the challenged order in the record. Medellin contends that appellate counsel rendered ineffective assistance by not asking the Court of Criminal Appeals to vacate his death sentence because the trial court initialed the portion of his written order that would prevent his capital prosecution, even when the trial

court clearly evinced on the record the intent to deny the motion.

Medellin raised this claim on state habeas review. There, the same court which presided over his trial issued the following factual finding: "The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error." State Habeas Record at 204, ¶ 31.[11] On that basis, the court denied habeas relief. State Habeas Record at 215, ¶ 8. This conclusion is neither contrary to, nor an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

The state habeas court explicitly found its notation on the written order was inadvertent. This Court must presume that finding to be correct unless Medellin shows clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). Medellin has not produced any evidence that would suggest that the trial court intended to prevent the State from seeking a death sentence. The record itself, most particularly the interchange where the trial court orally denied the motion, supports the conclusion that the written order reflects an inadvertent error. Nothing would indicate that the trial court meant to prevent the State from seeking a death sentence.

An appellate attorney cannot be faulted for not raising meritless claims. *See United States v. Kimler*, 167 F.3d 889,

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[11] The trial court actually found "based on the applicant's trial in which the State sought the death penalty and on the applicant's resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death." State Habeas Record at 204, ¶ 33.

893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."); *Williams v. Collins,* 16 F.3d 626, 634 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994). "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins,* 19 F.3d 959, 966 (5th Cir.), *cert. denied*, 513 U.S. 966 (1994); *see also Green v. Johnson,* 160 F.3d 1029, 1037 (5th Cir. 1998) ("[F]ailure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness . . . "), *cert. denied*, 525 U.S. 1174 (1999). The trial court obviously made an inadvertent mistake in signing the order upon which Medellin now relies. Appellate counsel had no chance of crafting that into a viable, meritorious appellate argument. The state habeas court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

II. Vienna Convention

Medellin is a citizen of Mexico. Medellin contends that he was never given consular access before, during, or after his trial. Medellin maintains that this denial of consular assistance violated his rights under the Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(1), 8 I.L.M. 4 (1969) ("Vienna Convention"). Because of this denial, Medellin asks this Court to order that a new trial be held.

Medellin presented this claim on state habeas review. The state habeas court held that Medellin failed to object

to the violation of the Vienna Convention at trial. On that basis, the state habeas court concluded that his failure to properly preserve the claim waived his right to assert the claim on post-conviction review. State Habeas Record at 210, ¶ 13.[15] Respondent argues that the state habeas court's reliance on an independent and adequate state procedural rule, *i.e.*, Texas' contemporaneous objection rule, bars federal consideration of Medellin's Vienna Convention claim.

The Fifth Circuit "has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. State*, 169 F.3d 295, 300 (5th Cir. 1999); *see also Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *Nichols v. Scott*, 69 F.3d 1255, 1280 n.48 (5th Cir. 1995), *cert. denied*, 518 U.S. 1022 (1996); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir.), *cert. denied*, 516 U.S. 1005 (1995). Medellin, however, argues that Vienna Convention claims are exempt from the constrains of the procedural default doctrine.

In *Breard v. Greene*, 523 U.S. 371 (1998), the Supreme Court considered the effect of the procedural default doctrine on a prisoner's Vienna Convention claim. Recognizing that federal courts "should give respectful consideration to the interpretation of an international treaty

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[15] The state habeas court also considered the merits of Petitioner's Vienna Convention claim. A state court's alternative adjudication of a claim on the merits does not vitiate the validity of its procedural bar. *See Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir.) ("It is clear in this Circuit that alternative rulings do not operate to vitiate the validity of a procedural bar that constitutes the primary holding."), *cert. denied*, 525 U.S. 1049 (1998).

rendered by an international court," the Supreme Court nonetheless found that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.[13] The Supreme Court held that the procedural default doctrine could bar consideration of a Vienna Convention claim. *See id.* at 375-76. The Supreme Court supported this finding by recognizing that the procedural default doctrine applied is even to claims brought under the United States Constitution – a document "'on full parity with a treaty.'" *Id.* ay [sic] 376 (quoting *Reid v. Covert,* 354 U.S. 1, 8 (1957)). The Supreme Court also expressed doubt that any Vienna Convention claim could be successful absent "some showing that the violation had an effect on the trial." *Breard,* 523 U.S. at 377 (citing *Arizona v. Fulminate,* [sic] 499 U.S. 279 (1991)). The *Breard* decision would allow Medellin's failure to comply with Texas' contemporaneous objection rule to bar federal review of this claim.

Medellin, however, argues that a case decided in the International Court of Justice ("ICJ") abrogates reliance on a procedural bar in rejecting Vienna Convention claims. In the *LaGrand Case (Germany v. United States),* 2001 I.C.J. 104, the ICJ found that the procedural default rule itself did not violate the Vienna Convention. *See LaGrand*

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[13] The Supreme Court noted that "[t]his proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Breard,* 523 U.S. at 375 (quoting Article 36 2), [1970] 21 U.S. T., at 101])

Case, 2001 I.C.J. 104, at ¶ 90.[14] The ICJ, however, condemned the application of the procedural default rule when "it prevent[ed] 'full effect [from being] given to the purposes for which the rights accorded under [the Vienna Convention] are intended." *Id.* at ¶ 91. The ICJ held that, because of "the failure of the American authorities to comply with their obligation" under the Vienna Convention, "the procedural default rule prevented [LaGrand] from attaching any legal significance" to the State's violation of the Vienna Convention. *Id.* According to Medellin, the effect of the *LaGrand Case* is that "procedural default rules may not be invoked to deny merits-based review of [a Vienna Convention] violation." (Docket Entry # 24 at 21).

Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule. The Supreme Court has long held that such procedural rules bar federal consideration of defaulted claims, except under narrow exceptions. Medellin's reliance on the *LaGrand Case* would create a wholesale exception to procedural limitations when a petitioner raises Vienna Convention claims – potentially invalidating well-settled law such as the AEDPA's insistence on the exhaustion of remedies and the timely presentation of claims. The concerns of comity, federalism, and finality of state judgements suggest that this Court refrain from jettisoning the procedural bar doctrine until the Supreme Court reconciles its caselaw

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[14] The ICJ previously entered an order requiring the United States to ensure that LaGrand was not executed. Arizona executed LaGrand in 1999. The ICJ did not enter its final judgment in the *LaGrand Case* until 2001.

with the ICJ action in the *LaGrand Case*. This Court is simply wary of finding that the ICJ overruled entrenched Supreme Court precedent.[15]

Even if this Court were to consider the merits of the claim, Medellin is not entitled to federal habeas relief The state habeas court found that Medellin "as a private individual, lacks standing to enforce the provisions of the Vienna Convention." State Habeas Record at 216, ¶ 15. Federal law supports the state habeas court's rejection of this claim. The preamble to the Vienna Convention explains that it is "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States. . . . " On that basis, the Fifth Circuit has refused to recognize that the Vienna Convention "creates judicially enforceable rights of consultation between a detained foreign national and his consular office." *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001).[16] If this

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[15] The wisdom in this approach is suggested by the fact that the Supreme Court refused to stay LaGrand's execution, notwithstanding the fact that the ICJ ordered the United States to "take all measures at its disposal to ensure that [LaGrand] is not executed pending the final decision in these proceedings." *LaGrand Case*, 2001 I.C.J. 104, at 32. The Supreme Court's refusal to stay LaGrand's execution raises substantial questions concerning its own view of the ICJ's ability to intrude in American legal proceedings.

[16] In *Beard* [sic], the Supreme Court considered whether the Vienna Convention provided a private, enforceable right. Finding the claim procedurally barred, the Supreme Court did not directly rule on the claim. While the Supreme Court noted that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest[,]" the Supreme Court left the resolution of that issue to the lower courts. 523 U.S. at 376. Since 1970, the United States Department of State has interpreted the Vienna Convention as not creating enforceable individual rights. *See United States v. Li*, 206 F.3d 56, 63 (1st Cir.), *cert. denied*, 531 U.S. 956 (2000). The federal circuit

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Court were to recognize that the Vienna Convention created a personally-enforceable right, such a finding would create a new rule of law, violating the non-retroactivity principle of *Teague v. Lane*. *See Flores v. Johnson*, 210 F.3d 456, 457-58 (5th Cir. 2000) (finding that any recognition of enforceable, individual rights under the Vienna Convention would amount to a new rule of law in violation of Teague's non-retroactivity principle), *cert. denied*, 531 U.S. 987 (2000). The ICJ's rejection of the procedural default doctrine in Vienna Convention cases did not purport to overrule the Supreme Court's weighty Teague jurisprudence. This Court, therefore, cannot grant habeas relief on Petitioner's Vienna Convention claim.

Even if procedural law and non-retroactivity principles did not mandate the denial of this claim, and the Court were to assume that the Vienna Convention created an enforceable right, Petitioner would have to show concrete, non-speculative harm for the denial of his consular rights. *See Breard*, 523 U.S. at 377; *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, 519 U.S. 995 (1996). When a Vienna Convention claim is "properly raised and proven, it is extremely doubtful that the

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courts that have considered the issue have generally refused to address the merits of the question, instead finding that the defendant failed to demonstrate prejudice or sought an unavailable remedy. *See United States v. De La Pava*, 268 F.3d 157, 164-66 (2nd Cir. 2001); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-88 (10th Cir. 2001); *United States v. Page*, 232 F.3d 536, 540 (6th Cir.), *cert. denied*, 532 U.S. 935 (2001); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000); *United States v. Chanthadara*, 230 F.3d 1237, 1255 (10th Cir. 2000), *cert. denied*, 122 S. Ct. 457 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). No circuit court has held that the Vienna Convention creates valid, enforceable individual rights.

violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377. Medellin contends that the Mexican Consular would have taken immediate steps to secure representation for him and would have advised him not to confess to the rape and murder of the two young girls.

The state habeas court, however, found that Petitioner "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellin] was provided with effective legal representation upon [his] request; and, [his] constitutional rights were safeguarded." State Habeas Record at 217, ¶ 16. Petitioner has not shown that this determination was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin's allegations of prejudice are speculative. The police officers informed Medellin of his right to legal representation before he confessed to involvement in the murders. Medellin waived his right to advisement by an attorney. Medellin does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellin would not have waived those rights as he did his right to counsel. Medellin fails to establish a "causal connection between the [Vienna Convention] violation and [his] statements." *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002). Petitioner has failed to show prejudice for the Vienna Convention violation.[17] This claim is denied.

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[17] Furthermore, Petitioner has not demonstrated that a new trial would be an appropriate remedy under the Vienna Convention. The Vienna Convention does not articulate a specific remedy for its

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III. *Batson* Claim

Medellin claims that the State violated his constitutional rights through the discriminatory use of peremptory challenges. Medellin first raised the issue of discrimination when the State used a peremptory challenge to excuse potential juror Elizabeth Ann Berry. Medellin raised a *Batson*[18] challenge, contending that the State only struck Ms. Berry because she was an African-American woman. Tr. Vol. 20 at 227. After Medellin raised the *Batson* challenge, the following exchange occurred:

> Trial court: Mr. Millin, that's plenty. If you want to put something in rebuttal, that's fine. But there's a Batson challenge on the table. Mr. Vinson, do you want to go ahead and – I will ask that the State, regardless of a prima facie showing, put its explanation on the record at this time because its fresh in everybody's mind. Mr. Millin, if you want to reurge your Batson

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violation. *See Jimenez-Nava*, 243 F.3d at 199. Federal courts generally hold that Vienna Convention violations do not require the dismissal of an indictment or the suppression of evidence. *See De La Pava*, 268 F.3d at 164-66; *Page*, 232 F.3d at 540-41; *Cordoba-Mosquera*, 212 F.3d at 1195-96; *Li*, 206 F.3d at 61-62. The Fifth Circuit has held that reversal is not an appropriate remedy when trial counsel had access to the same information as consular officials. *See Faulder*, 81 F.3d at 520. The Fifth Circuit has also rejected the suggestion that the exclusionary rule should prevent the introduction of confessions taken in violation of the Vienna Convention. *See Jimenez-Nava*, 243 F.3d at 197-98. No court has reversed a capital conviction or set aside a death sentence on the basis of a Vienna Convention violation. This Court questions its ability to overturn Medellin's conviction and sentence under the Vienna Convention, especially in light of his failure to demonstrate prejudice.

[18] *Batson v. Kentucky*, 476 U.S. 79 (1986).

motion at a later time. The jury (sic) is not clearly the reason of selecting a capital murder jury.

The State: I guess the main issue and problem that I have with Ms. Berry is that she has two brothers of which both have been involved in drugs. Both have been to the penitentiary. One, I think, has been on numerous occasions, she testified to. And I think one is released on parole at this time and one is in custody at the penitentiary at this time as well. Moreover, I did not feel comfortable with Mrs. Berry's characterization of the prosecutors as on the attack and defense attorneys as being the underdog. And throughout this trial, I would have a perception in my mind to present my case to Mrs. Berry, she's looking at the defendant as the underdog and I'm the one on attack, like a wild mongrel.

Tr. Vol. 20 at 227-28. The prosecutor also provided relevant personal information relating to his choice of strikes:

The State: Moreover, your Honor, the record as [sic] been silenced on my color. The prosecutor in this case, I would like the record to reflect is a black prosecutor and has an appreciation of blacks serving on juries, having grown up during the 40's, 50's, 60's, 70's, 80's, and 90 –

Trial court: Are you saying you're an old black prosecutor?

The State: That's right.

Trial court: Let the record reflect that Mr. Vinson is African American and he is old. However, he is

The State: And youthful in appearance.

Trial court: However, he looks much younger than his years.

Tr. Vol. 20 at 228-29. In rebuttal, the defense argued that Mrs. Berry expressed an ability to be impartial notwithstanding her brothers' criminal record. Tr. Vol. 20 at 229. The trial court then denied the *Batson* challenge to Mrs. Berry as follows:

Trial court: Let me state that I do not believe that there's a prima facie showing that's been made at this time. However, I find based on observing Ms. Berry's demeanor and her responses and viewing her questionnaire, that Mr. Vinson's reason[s] proffered are racial, neutral reasons. At this time, I will deny any Batson motion. If you'd like to, Mr. Millin, reurge your Batson challenge at the end of the jury selection, I will reconsider it at that time as well. However, let the record reflect at this time – still at this time, our nine-man jury is comprised of a black female, a Hispanic male, a Hispanic female, a black male. . . . And so there's no indication of gender bias. There are – the composition of males to females are a black female, a white female, a Hispanic female, a white female; and with regard to

men, Hispanic male, a white male, a black male, and a second white male.

Tr. Vol. 20 at 230-3 1.

Medellin next raised a peremptory challenge when the State excused potential juror Rafael Rodriguez with a peremptory strike. The trial court found that Medellin made a prima facie case for the purposes of *Batson* by noting that the potential juror was Hispanic and had generally stated that he could be impartial. Tr. Vol. 21 at 117. The State then explained the motivation for striking Mr. Rodriguez:

The State: My reason for striking Mr. Rodriguez is there was a great deal of hesitation with his explanation on the death penalty when he was speaking with you. He's also for the death penalty without any compulsion whatsoever if it happened to one of his relatives. I still do not have a full understanding of his position on the death penalty. With respect to the question I asked him, he gave me a philosophical – he gave a theological and Biblical and his own philosophy. One of the things put me on edge, turning the cheek, you turning the other cheek. That goes back to the philosophy if you're slapped, you turn the other cheek. I'm afraid he may be looking to turn the other cheek in this case, and I don't want it turned in my favor.

Tr. Vol. 21 at 117-18. The trial court found that to be a race-neutral explanation and denied the *Batson* challenge. Tr. Vol. 21 at 118.

After the parties selected the jury panel, Medellin filed a "Motion to Strike Jury Panel." Tr. Vol. I at 260. According to Medellin's count, the State struck eight men and five women. Five of those excluded [sic] white, six were black, and two were Hispanic.[19] Medellin argued that the State based its voir dire strategy on removing minorities and men from the jury panel.

On August 17, 1994, the trial court discussed Medellin's motion to strike the panel in a pretrial hearing. In that hearing, the defense asked the court to quash the entire panel because the State allegedly used its peremptory challenges in a discriminatory manner. Tr. Vol. 26 at 11-12. The State responded to that allegation:

> The State: Your Honor, I think the record will reflect too the final disposition of that jury again is a melting pot jury. And while the State exercised those strikes, I think it was 13 – I don't have mine with me right now. But those are all race neutral strikes.

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[19] In his motion, Medellin noted that the State exercised its peremptory challenges against the following prospective jurors: Kirven O'Neal Tillis, a black male; Mary Freeman, a white female; Kathy Felder, a black female; Bernard Richardson, a black male; Walter Wynn Martin, a white male; Andre McCoy, a black male; Marie Clark, a white female; Vastine Dickie, a black male, Christine Rossie, a white female; Raford Earl Gresham, a white male; Porfirio Rodriguez, a hispanic male; Elizabeth Ann Berry, a black female; and Rafael Rodriguez, a hispanic male. Tr. Vol. I at 264.

Tr. Vol. 26 at 12-13. At that point, the trial court went off the record. The record from that hearing does not reflect any further on-the-record discussion of the *Batson* issue. On August 19, 1994, the trial court entered a written order denying Medellin's motion to strike the jury panel. Tr. Vol. I at 267.

A. *Claim raised on direct review*

On direct appeal, Medellin raised a single Batson claim. Medellin argued that the State violated the equal protection clause with respect to the peremptory strike of Mr. Rodriguez.[20] The Court of Criminal Appeals recognized that the trial court found that Medellin made a prima facie case for discrimination. Opinion at 12. The Court of Criminal Appeals then noted that the State gave a race-neutral explanation for the challenge to Mr. Rodriguez: that his opinion on the death penalty would not make him an attractive juror for the State. Opinion at 12. The Court of Criminal Appeals found that

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[20] Medellin raised this claim under *Batson* and under the relevant state statute prohibiting the use of race-based peremptory challenges. While the Court of Criminal Appeals found that Medellin failed to preserve error on his state law claim, the Court of Criminal Appeals considered the merits of his *Batson* argument. Apparently anticipating that Respondent would rely on the procedural default doctrine to bar this claim, Medellin now argues that appellate counsel rendered ineffective assistance by failing to present a broad *Batson* claim on direct review. Medellin has not shown that he was prejudiced by this failure. Aside from the fact that he fails to show that a *Batson* violation actually existed, Medellin presented the *Batson* claim on state habeas review where it received full consideration by the Court of Criminal Appeals. The state habeas court rejected that claim. There is no reason to suppose that the claim would have fared better on direct review. Medellin fails to show *Strickland* prejudice with respect to the ineffective-assistance-of appellate counsel nuance of his *Batson* claim.

> [t]he trial court accepted these reasons as race-neutral and appellant made no attempt to rebut the explanations given or otherwise explain why they were only pretexts for discrimination. A review of the entirety of the veniremember's voir dire reveals that the prosecutor's reasons were supported by the record. Given this, we cannot say that the judge's ruling in this instance was clearly erroneous.

Opinion at 12.

Medellin renews his *Batson* claim against Mr. Rodriguez in his federal petition. Medellin argues that the lack of clarity in Mr. Rodriguez's opinion on the death penalty does not provide a race-neutral basis for a peremptory strike. Medellin argues that the trial court should have required additional questioning of Mr. Rodriguez. The record indicates, however, that the peremptory strike of Mr. Rodriguez complied with the Supreme Court's *Batson* jurisprudence.

Under *Batson v. Kentucky,* 476 U.S. 79 (1986), the State violates the equal protection clause when it challenges potential jurors solely on the basis of race. A court addresses *Batson* claims under a three-step burden shifting scheme:

> [t]he process for evaluating an objection under *Batson* requires that (1) a defendant make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Thompson v. Cain, 161 F.3d 802, 810-11 (5th Cir. 1998); *see also United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000); *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). "'The 'shifting burden' described in the *Batson* framework is one of production only.' The party asserting the claim of purposeful discrimination always shoulders the ultimate burden of persuasion." *Soria v. Johnson*, 207 F.3d 232, 239 (5th Cir.) (quoting *Bentley-Smith*, 2 F.3d at 1373), *cert. denied*, 530 U.S. 1286 (2000); *see also Lockett*, 230 F.3d at 707 (citing *Batson* and stating that "[t]he burden of demonstrating that a constitutional violation occurred is, or [sic] course, on a habeas petitioner.").

In the instant case, the trial court called on the State to provide a race-neutral explanation for the use of the peremptory strike against Mr. Rodriguez. "Once a court has taken that step, we no longer examine whether a prima facie case exits." *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999). This Court's "decision, then, must rest on (1) whether the government articulated race-neutral explanations for the exercise of its challenges and (2) whether [the petitioner] has demonstrated that those justifications are pre-textual and that the government engaged in purposeful discrimination." *Id.*

As previously noted, the State offered several reasons for its peremptory strike of Mr. Rodriguez that were not based on his race. Under the second part of the *Batson* burden-shifting scheme, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (finding the prosecution's explanation that the potential juror had long hair and a beard to be a sufficient race-neutral explanation for the purposes of the

second step of the *Batson* analysis); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991).[21] "In such cases, a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*; *see also Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1040 ("In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

Medellin now disputes the reasons proffered by the State, pointing to Mr. Rodriguez's testimony in an attempt to show that the State's reasons were baseless or warranted further questioning. "[T]he ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-biased." *Bentley-Smith*, 2 F.3d at 1375. In *Batson* the Supreme Court noted that the finding of intentional discrimination is a factual finding that "largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21. In making such determinations, the trial court evaluates the State's explanation, but also observes the demeanor of the prosecutor and the prospective jurors. *See Jones v. Butler*, 864 F.2d 348, 369 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989) *Hernandez*, 500 U.S. at 365 (stating that "the best

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[21] "Under *Batson*, a prosecutor's explanation for a peremptory strike need not rise to the level of a challenge for cause; rather, it merely must contain a clear and reasonably specific articulation of legitimate reasons for the challenge." *United States v. Clemons*, 941 F.2d 321, 325 (5th Cir. 1991). At the second step, the "race-neutral explanation tendered by the proponent need not be persuasive, or even plausible." *United States v. Huey*, 76 F.3d 638, 641 (5th Cir. 1996). Indeed, the explanation "simply must be race-neutral and honest." *Webster*, 162 F.3d at 349.

evidence often will be the demeanor of the attorney who exercises the challenge"). "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1040. In essence, "the decisive question will normally be whether a proffered race-neutral explanation should be believed." *Bently-Smith* [sic], 2 F.3d at 1373.

A state court's credibility determinations are afforded "significant deference" on federal review, especially in light of the AEDPA. *See Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1041.[22] Under the AEDPA, a petitioner bears the substantial burden of showing that a state court erred in its credibility determination. *See id.* at ___, 123 S. Ct. at 1041-42. This Court is bound by the factual findings of the Court of Criminal Appeals unless Medellin can demonstrate by clear and convincing evidence that the presumption of correctness should not apply. *See* 28 U.S.C. § 2254(e)(1).

Under *Batson's* final step, Medellin ultimately bears the burden of establishing that the government engaged in "purposeful discrimination" based on race. *Purkett*, 514 U.S. at 767; *Bentley-Smith*, 2 F.3d at 1373. Here, Medellin "offers no direct evidence of purposeful discrimination, but rather argues that the government's proffered reasons are pretextual. . . ." *Id.* Medellin attempts to prove his case by demonstrating an absence of record support for the

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[22] This deference does not suggest an abdication of judicial review. *See Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1041. A federal court may reject a state credibility finding so long as a petitioner complies with the AEDPA's stringent standards. *See id* at ___, 123 S. Ct. at 1041.

reasons offered by the State; however, even if the reasons advanced by the State are only weakly supported by the record, the thrust of this Court's analysis concerns the State's intent in seeking the peremptory strike. *See Bently-Smith* [sic], 2 F.3d at 1373-74 (stating that as a general rule, "[t]here will seldom be any evidence that the claimant can introduce – beyond arguing that the explanations are not believable or pointing out that similar claims can be made about non-excluded jurors who are not minorities"). While Medellin now asks this Court to find that the reasons advanced by the State during jury selection were pre-textual, he must also demonstrate that the State engaged in purposeful discrimination on the basis of race or gender. The record supports a finding that the State did not exercise its peremptory challenge on account of race or gender. The State struck Mr. Rodriguez for his opinion on the death penalty. That excuse is sufficiently race-neutral to survive a *Batson* challenge.

After a review of the record, this Court finds Medellin has not demonstrated why the deference to the trial judge's implicit determination concerning the prosecution's intent should be called into doubt. Accordingly, Medellin has not provided clear and convincing evidence that the state court findings were incorrect. *See* 28 U.S.C. § 2254(e)(1). Medellin has also failed to demonstrate that the state court's decision rejecting the *Batson* claim against Mr. Rodriguez was "an unreasonable determination of the facts in light of the evidence. . . . " 28 U.S.C. § 2254(d)(2).

B. *Claim raised on state habeas review*

On state habeas review, Medellin raised the expansive *Batson* claim which he now presents in his federal petition. As opposed to the challenge to Mr. Rodriguez's dismissal raised on direct review, Medellin's state habeas claim broadly challenged the State's motive in exercising all of its peremptory challenges. Medellin argued that he made a prima facie showing that the State's practice in jury selection was to remove all African American and male jurors. To establish the alleged pattern of discriminatory strikes, Medellin relied only on the fact that the State used six of its thirteen peremptory strikes to remove minority potential jurors and also used eight to excuse men, resulting in a pattern of discriminatory strikes. Medellin also criticized the trial court for not making the State provide a race-neutral reason for each of those strikes when he raised the issue after the impanelment of the jury.

The state habeas court rejected this claim. The state habeas court first reviewed the voir dire of Elizabeth Ann Berry, the only potential juror other than Mr. Rodriguez specially identified by Medellin on habeas review as being subject to a discriminatory strike. The state habeas court found that the State's explanation for striking Ms. Berry, that she had brothers who were incarcerated and displayed a manner favoring the defense, was race neutral. State Habeas Record at 199, ¶¶ 5-9, 11. The state habeas court also relied heavily on the prosecutor's credibility. The state habeas court noted that the prosecutor was himself black. State Habeas Record at 200, ¶10. The state habeas court specifically noted previous cases in which the prosecutor had exercised peremptory challenges without

discriminatory motive. State Habeas Record at 202-03, ¶¶ 25-26.

The state habeas court concluded that Medellin's motion in which he merely described the composition of the peremptory strikes failed to establish a prima facie case of discrimination. State Habeas Record at 213, ¶ 3. The state habeas court found that the prosecution employed racially-neutral strikes. State Habeas Record at 214, ¶¶ 4-5. Accordingly, the state habeas court also found that appellate counsel's failure to raise a broad *Batson* claim on direct review did not violate Medellin's constitutional rights. State Habeas Record at 214, ¶ 7.

The state habeas court's decision on this issue was not unreasonable in light of the facts of this case. Medellin based his arguments to the trial court only on an alleged pattern of strikes used by the State. Those strikes, however, did not demonstrate a markedly disproportionate application against members of a particular racial group or gender. The composition of the jury in this case does not suggest the exclusion of a cognizable group. The state habeas court found that Medellin did not make a prima facie case for discrimination; this Court agrees.[23]

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[23] Medellin argues that he made a prima facie case for discriminatory intent, but also claims that the State did not provide any race-neutral explanation for its strikes. Generally, once a State provides a race-neutral explanation the question of whether a defendant has made a prima facie case becomes moot. *See Ladd v. Cockrell*, 311 F.3d 349, 355 (5th Cir. 2002). Here, the trial court did not ask the State to explain its strikes; the State addressed the defense's objection on its own initiative. Tr. Vol. 26 at 12. The State's explanation, that the jury represented a "melting pot," challenged the establishment of a prima facie case.

After the State challenged the defense's prima facie case, the trial court went off the record. The record is silent as to whether the trial court and the parties continued discussing the *Batson* challenge. Medellin has not provided affidavit or other evidence that would indicate what transpired during the off-the-record discussion. The discussion, however, is of no moment. Medellin has failed to make a prima facie case of discrimination, both in state and federal court. While a *Batson* challenge may rest on either the discrete circumstances of a particular strike or a showing of historic, systemic discrimination, *see Batson,* 476 U.S. at 96, Medellin only shows that, while accepting minority and male jurors, the State struck some African-Americans and men. He has not shown a "pattern of strikes" against a protected group. *See id.* at 97. The absence of a pattern is evident from the fact that at least four minorities and an equal number of men and women served as jurors at trial.

The state court also made a credibility determination that must be presumed correct under 28 U.S.C. § 2254(e)(1). The state habeas court, based on its experience with the prosecutor and on its observation of the proceedings, found that the State did not engage in discrimination. Medellin makes no showing to the contrary. The record before the Court would suggest that the state determination is correct. The state court's rejection of this claim was not unreasonable. *See* 28 U.S.C. § 2254(d)(2). This claim is denied.

IV. *Brady* Claim

Medellin contends that the State failed to disclose material evidence before trial. Medellin argues that the

State violated his constitutional rights by not disclosing the fact that one witness at trial, Joe Cantu, had previously been arrested for an unrelated charge that had been dropped. Medellin assumes that the State dropped the charges in exchange for his trial testimony. Also, Medellin argues that the State failed to disclose important impeachment evidence by not passing along the fact that Joe Cantu and his wife unsuccessfully sought compensation and protection from the police in return for their testimony.

A. *Background*

Before trial, Medellin requested that the State turn over any exculpatory evidence, including "[a]ny 'deals,' whether expressly written or implied, to any individual who agrees to testify for the State in this case." Tr. Vol. I at 44, 67-74. In an August 17, 1994, pre-trial hearing, the State agreed to "run out of an abundance of precaution the criminal records of any witnesses." Tr. Vol. 26 at 28. The trial court also ordered the State to provide the defense with information about any witness' "final convictions and felonies," along with any witness' placement on deferred adjudication. Tr. Vol. 26 at 29. The, trial court then questioned the need for disclosure of arrest records:

Trial court:	Why would arrest records be relevant?
Trial counsel:	Well, Your Honor, it could possibly go to any kind of agreements that could possibly have been made. I certainly don't believe there are any.
Trial court:	You have a separate motion for that?

Trial counsel: Right. But that's why it could possibly be relevant in this motion as well.

Trial court: Well, the arrest records I don't believe are relevant except and to the extent that they provide the basis for some type of an agreement by the District Attorney's Office. So articulate some reason why they might be or some bias

Trial counsel: In other words, if somebody has a case dismissed in order that he might testify.

Trial court: I think your Motion to Disclose or to Reveal the Agreements –

Trial counsel: That covers – that should cover it.

Trial counsel: So then denied as to the arrest records and granted as to the conviction records, is that correct?

Trial court: Yes. And the conviction includes things like deferred adjudication and probation and, of course, your Brady Motion covers all of this. So if there is something that is somehow exculpatory about an arrest –

Trial counsel: The State's witness –

Trial court: Right. Or if it reveals some type of bias on the part of the witness, I expect that it should be disclosed under –

Trial counsel: Under Brady.

The State: Okay.

Trial court: Okay.

Tr. Vol. 26 at 30-31. In that hearing, the parties also discussed the fact that the State had assured that it made no agreements with the witnesses in this case. Tr. Vol. 26 at 32-33.

On state habeas review, Medellin claimed that the State failed to disclose the arrest of Joe Cantu for making terroristic threats.[24] At trial, Joe Cantu and his wife Christina related statements made to them by Medellin after he participated in the rape and murder of the two young victims. Joe and Christina Cantu's testimony helped establish Medellin's precise role in the girls' death. Trial counsel asked Joe Cantu at trial whether he had entered into any deal in exchange for his testimony:

Trial counsel:	Have you, Mr. Cantu, received anything from the State in the way of any assistance, anything like that, to secure your presence as a witness?
Mr. Cantu:	I don't understand your question.
Trial counsel:	Have you been given anything by the State in order for you to be available to testify?
Mr. Cantu:	Just that I won't be prosecuted for anything that I say.
Trial counsel	And did the State talk to you about the possibility of you being prosecuted for you pawning that stolen necklace?
Mr. Cantu:	No.

[24] Joe Cantu was the brother of one of Medellin's co-defendants and a former member of Medellin's gang.

Trial counsel: They did make an agreement not to prosecute you if you did testify?

Mr. Cantu: They didn't say nothing about that.

The State: We made no agreement with this –

Trial court: Approach the bench.

(WHEREUPON, there was a discussion held off the record outside the hearing of the court reporter)

Trial counsel: So, anyway, Mr. Cantu, you testified that it was agreed that you wouldn't be prosecuted for anything you said today; is that right?

Mr. Cantu: Not today but in the previous –

Trial counsel: Okay. In the previous – you've already testified in several trials; is that right?

Mr. Cantu: Right.

Tr. Vol. 30 at 544-45. Medellin argues that Joe Cantu lied; he contends that evidence produced during the state habeas proceedings shows that the State entered into a deal to secure Mr. Cantu's testimony.

Medellin bases his claim on an affidavit from Christina Cantu. Christina Cantu's affidavit describes information about her and her husband's testimony that was not presented to the defense. Christina Cantu describes how she asked the prosecution about the possibility of a reward in exchange for their testimony, but states that the police told her that the available award money in this case went to another individual. Christina Cantu also states that the State promised her "protection as a witness," but that "never occurred." Because of that, she was "physically

beaten at school several times." Christina Cantu also provides details about Joe Cantu's arrest for making terroristic threats:

> Around the time that Jose Medellin went to trial, my husband, Joe Cantu, was arrested for threatening to blow up his place of employment, American Plasma. Joe's brother, Rudy Cantu, informed me of this arrest. I contacted Gail Hayes of the Harris County District Attorneys Office and she stated she was aware of Joe's arrest. Joe was in jail for two days. When he was released he informed me that he spoke with Gail Hayes and that she contacted an attorney for him. I know that Joe went to court one time on this case, but I do not believe he was ever charged or paid a fine. I have never informed anyone about Joe's arrest.

(Docket Entry # 12, Exhibit E). Medellin supports the information contained in Christina Cantu's statement with an affidavit from his trial counsel, Linda Mazzagatti. Trial counsel states that

> With respect to Joe Cantu and Christina Cantu, [current federal habeas counsel] asked me whether I remembered receiving any information, from the District Attorney's Office or elsewhere, that Jose Cantu was arrested for threatening to blow up his place of employment. I have no independent memory of ever learning such information, and my records do not reflect such information.

(Docket Entry # 12, Exhibit G). An investigator's affidavit indicates that the State filed charges against Joe Cantu on

June 23, 1994, and then dismissed those charges due to insufficient evidence shortly before Medellin's trial. (Docket Entry # 12, Exhibit I).

Medellin argues that the existence of a deal between the State and Joe Cantu requires reversal of his conviction. Medellin states that

> Joe Cantu's testimony in particular appeared to be credible because he testified against his brother and friends, for no discernable reason. However, had the jury learned that Joe Cantu and Christina were expecting "witness protection," considering the possibility of a reward, currently charged with a criminal offense and represented by an attorney secured by the prosecutors, reasons for the Cantu's testimony. Clearly, such impeachment information was "material" in this case.

(Docket Entry # 12 at 39-40).

In state habeas court, the State produced an affidavit from the prosecutor in this case. The prosecutor stated that he did not enter into any agreements with the Joe or Christina Cantu in exchange for their testimony. State Habeas Record at 108. The prosecutor stated that "I was not involved in Joe Cantu's misdemeanor case and had nothing to do with the ultimate disposition of his case." State Habeas Record at 108. The prosecutor affirmed that he made no promise to the Cantus for a reward in exchange for their testimony. State Habeas Record at 108. Marie Munier, a prosecutor from one of Medellin's co-defendants also submitted a statement wherein she related that she knew about Joe Cantu's arrest, but did not make any deals with him in exchange for his testimony. State Habeas Record at 111. That prosecutor stated

that she made no promise for a reward in exchange for Joe and Christina Cantu's testimony. State Habeas Record at 111.

The State also submitted an affidavit from Gail Hayes, an investigator who worked for the Harris County District Attorney's Office. Ms. Hayes stated that in her investigation of this case "Joe and Christina Cantu asked me about the Crime Stoppers reward money. Subsequently, I learned that the Crime Stoppers money had been given to Christina's sister. I never promised or made assurances to either Joe or Christina Cantu that they would receive any reward money in exchange for cooperation or testimony." State Habeas Record at 114-15. Ms. Hayes also stated that she did not promise any protection or deal to Mr. or Mrs. Cantu in exchange for their testimony. State Habeas Record at 115. Ms. Hayes also addressed the question of Joe Cantu's arrest:

> Prior to trial, Christina Cantu telephoned me and told me that Joe Cantu had been arrested. Joe Cantu was working at a plasma clinic, got into an argument with someone, made a statement about "blowing the place up," and was subsequently arrested. I informed Marie Munier about Joe Cantu's arrest either that night or the next business day. I have no knowledge of any events concerning Joe Cantu's arrest after that time. I did not recommend a lawyer or give any lawyer's name to either Christina or Joe Cantu. I made no promises concerning the disposition of Joe Cantu's case or concerning his incarceration. I was not aware of the disposition of Joe Cantu's arrest until I talked with Assistant District Attorney Roe Wilson in December, 1999.

State Habeas Record at 115. The State also submitted an affidavit from Joni M. Vollman, the prosecutor in Joe Cantu's terroristic threat case. That prosecutor testified that the State did not make any deal with Joe Cantu in exchange for dismissing the charges against him. Instead, the State dismissed the terroristic threat case for a lack of evidence. State Habeas Record at 172. This testimony is confirmed by a copy of the State's Motion to Dismiss in that case. State Habeas Record at 220. The motion indicates that the charges were dismissed for "insufficient evidence." State Habeas Record at 220.

The state habeas court rejected Medellin's claim that the State violated his constitutional rights by not disclosing material exculpatory information prior to trial. The state habeas court reviewed the affidavits submitted by the State and found each to be credible. State Habeas Record at 210-21, ¶57-62. Finding the information contained in those affidavits did not indicate the existence of any deal between the State and Joe Cantu that resulted in the dismissal of his misdemeanor charge, the state habeas court issued the following legal conclusion:

> The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985) (holding that evidence is material where

> there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was denied due process under U.S. Const. amend. XIV and Tex. Const. art. 1, § 10.

State Habeas Record at 217-18 ¶18. Medellin is entitled to habeas relief if the state court's rejection of his claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin has failed to support his AEDPA burden with respect to this claim.

B. *Legal standard*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963); *see also Little v. Johnson,* 162 F.3d 855, 861-62 (5th Cir. 1998), *cert. denied,* 526 U.S. 1118 (1999). There are three elements required for a valid *Brady* claim: (1) the prosecution must suppress or withhold evidence, (2) which is favorable to the defense, and (3) material to either guilt or punishment. *See United States v. Lowder,* 148 F.3d 548, 550 (5th Cir. 1998); *In re Smith,* 142 F.3d 832, 836 (5th Cir. 1998); *East v. Johnson,* 123 F.3d 235, 237 (5th Cir. 1997). Evidence is "material" under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. *See Williams v. Puckett,* 283 F.3d 272, 279 (5th Cir. 2000), *cert. denied,* ___ U.S. ___, 123 S. Ct. 504 (2002).

C. *Failure to prove the existence of Brady material*

The thrust of Medellin' argument is that the State should have disclosed the existence of a deal wherein Joe Cantu's terroristic threat charge would be dropped in exchange for his testimony. Yet Medellin has never presented concrete evidence that such an agreement existed. Instead, Medellin rests his argument on the speculation that the State dismissed that charge as part of a secret deal. "Such speculation does not support a *Brady* claim." *Hughes v. Johnson,* 191 F.3d 607, 630 (5th Cir.1999), *cert. denied,* 528 U.S. 1145 (2000); *see also United States v. Dierling,* 131 F.3d 722, 736 (8th Cir. 1997) ("Mere speculation that the government had exculpatory evidence is an insufficient basis for a Brady claim. . . . "), *cert. denied,* 523 U.S. 1066 (1998); *United States v. Van Brocklin,* 115 F.3d 587, 594 (8th Cir. 1997) ("Mere speculation that materials may contain exculpatory evidence is not, however, sufficient to sustain a Brady claim."), *cert. denied,* 523 U.S. 1122 (1998). Medellin's claim is based on nothing more than insinuation. Medellin has not presented any factual allegation that would call into doubt the state habeas court finding that there was no deal with Joe Cantu.

Medellin's argument rests largely on the supposition that there must have been a deal because the State did not try Joe Cantu after his misdemeanor arrest. This argument fails to acknowledge the record evidence that strongly shows that charge was dismissed for insufficient evidence. Medellin has not produced any clear and convincing evidence that would show otherwise, and has failed to produce any competent summary judgment evidence that would demonstrate the existence of a "deal," much less the suppression of a "deal" by the State. Habeas

relief is unavailable on *Brady* claims based only on unsupported inferences.

Further, habeas relief is unavailable on the claim that the State failed to divulge Joe Cantu's arrest, independent of any deal. Through pretrial motions, the defense requested that the State provide information about the arrest record of its witnesses. However, in the pretrial hearing the defense agreed that the State would only turn over information about felony arrests and convictions. Tr. Vol. 26 at 28-31. It is undisputed that Joe Cantu had been arrested for a *misdemeanor* charge. As the defense agreed to the limitation of disclosure to felony offenses and convictions, Medellin cannot complain now that he did not know about Joe Cantu's arrest.

D. *Failure to prove materiality*

Even accepting as true Medellin's claim that the State failed to disclose information concerning Joe Cantu's arrest, his "deal," and the Cantus' request for a reward from Crime Stoppers and physical protection, he has failed to show materiality under *Brady*. The materiality standard for *Brady* claims focuses on whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The failure to provide the defense with the challenged information, insofar as it is correct, did not "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also Strickler v. Greene*, 527 U.S. 263, 290 (1999) (finding

evidence to be not material if there is only "a reasonable possibility that either a total, or just a substantial, discount of [a witness's] testimony might have produced a different result").

Medellin is correct in noting that the State placed great importance on Joe and Christina Cantu's testimony at trial. Nonetheless, they did not come before the jury unblemished. Trial testimony made the jury aware that the both had long participated in gang activity. Joe had been a member of the same gang as Medellin; Christina belonged to the "Heights" gang whose primary objective was "[s]tealing cars, jumping people." Tr. Vol. 29 at 433. The jury knew that Joe and Christina Cantu had destroyed physical evidence related to the murders and had pawned some of the victims' jewelry. The jury would not be surprised at the production of a criminal arrest record or at the presence of additional motives for testifying. Even so, the jury also knew that Joe Cantu agreed to testify against his own brother and that the Cantus had reasons to come forward other than for personal gain. In other words, the introduction of the information that Medellin claims was suppressed would have had little impeachment value.

In addition, substantial and convincing evidence of Medellin's role in the murders existed independent from the testimony from Mr. and Mrs. Cantu. A member of the gang who left before they began raping the girls placed Medellin at the scene of the murders. Tr. Vol. 28 at 235-37. Medellin gave some of the victims' jewelry to his girlfriend. Tr. Vol. 31 at 743-50. Most importantly, Medellin confessed to the rape and murder of the two girls. In highly disparaging language, Medellin described his involvement in the tortuous rapes and killings. Medellin's

confession admitted, at a minimum, to his sexual assault of the victim for whose death he was convicted. Also, his confession admitted that he "h[eld] one end of the shoe lace" used to strangle the victim. Simply, "[t]he record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [Joe and Christina Cantu] had been severely impeached." *Strickler*, 527 U.S. at 294. There is no reasonable probability of a different outcome had the defense received the information that Medellin claims was withheld.

The state court did not unreasonably conclude that Medellin failed to establish that a constitutional violation tainted his trial. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

V. Exclusion of Potential Juror

Medellin challenges the trial court's exclusion of potential juror Rosie L. Mackey for cause. When asked by the trial court whether she had any opposition to the death penalty she answered: "Religious beliefs. Thou shall not kill." Tr. Vol. 18 at 215. Ms. Mackey acknowledged a conflict: "I could follow the law; but, like I say, it's my religious belief. The law says one thing, and the religious belief says another." Tr. Vol. 18 at 216. Nonetheless, she indicated that she could impose a death sentence "if the evidence called for it." Tr. Vol. 18 at 216.

The State then questioned Ms. Mackey. The State focused on the statement in Ms. Mackey's jury questionnaire that she was "opposed to capital punishment under any circumstances." Tr. Vol. 18 at 218. She also indicated that she did not want to serve as a juror because of her

religious convictions. Tr. Vol. 18 at 219. Ms. Mackey affirmed that her religious beliefs would impair her ability to return a death sentence in this case, and that, in fact, she would try to find a way to give a life sentence. Tr. Vol. 18 at 221-23.

Trial counsel then questioned Ms. Mackey about her ability to serve as an impartial juror. Ms. Mackey stated that she would be able to consider the guilt/innocence issues without any problem. Tr. Vol. 18 at 228-29. When asked if she could answer the special issues in a manner requiring the imposition of a death sentence, she stated "I still would have a hard time with it. I could vote like that, but I still would have a hard time within myself." Tr. Vol. 18 at 229-30. Even so, she could not imagine a case in which she would be able to impose a death sentence, except that of Adolf Hitler. Tr. Vol. 18 at 230-31.

> The State again questioned Ms. Mackey and she clarified her position on serving as a juror:
>
> My religious belief is I don't believe in the death penalty. That was why I was asking if I could be excused from being in this jury or this case. I even stated on the paper – I remember on the back page that it stated: Would you want to be a juror in this case; I stated no.

Tr. Vol. 18 at 234. The trial court continued questioning Ms. Mackey. Ms. Mackey testified that she would be inclined to answer the special issues in such a way to ensure a life sentence, and would look at the evidence with that result in mind. Tr. Vol. 18 at 237.

The State moved to have Ms. Mackey excused for cause because of her inability to consider a death sentence. Tr. Vol. 18 at 238. Trial counsel opposed that motion. Tr.

Vol. 18 at 238. The trial court then made the following findings:

> The Court makes specific findings in the standard set forth in Wainwright versus Witt in that I think Ms. Mackey is the classic vacillating juror.
>
> Based on her responses to the questionnaire, which she had validated in her oral responses to the Court, the Court finds that her strong feelings against capital punishment would prevent or substantially impair her performance as a juror in accordance with her oath and the Court's instructions, specifically her strong religious background which Mr. Vinson certainly established, her checking that she was opposed to capital punishment under any circumstances.
>
> * * *
>
> The Court finds Ms. Mackey should be excused for cause.

Tr. Vol. 18 at 238-239.

Medellin raised this claim on direct review. After reviewing the applicable law and the voir dire transcript, the Court of Criminal Appeals stated that "[g]iven the totality of the voir dire, we cannot say that the trial court abused its discretion in sustaining the State's challenge for cause to the veniremember." Opinion at 10. This Court reviews that decision under the AEDPA.

Exclusion of prospective jurors "hesitant in their ability to sentence a defendant to death" without any limitations violates the Fourth and Fourteenth amendments. *Morgan v. Illinois*, 504 U.S. 719, 732 (1992); see also *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v.*

Illinois, 391 U.S. 510, 521-22 (1968). The State must demonstrate through questioning that the potential juror it seeks to exclude lacks impartiality, and the judge must then determine whether the state's challenge is proper. *See Wainwright v. Witt,* 469 U.S. 412, 423 (1985). Thus, the key issue is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams,* 448 U.S. at 45). "This standard . . . does not require that a juror's bias be proved with 'unmistakable clarity.'" *Wainwright,* 469 U.S. at 424. Thus, a reviewing court gives deference to a trial judge who could observe the demeanor of the potential juror. *Id.* at 424-26. This deference is consistent with AEDPA's presumption of correctness.

The exclusion of potential jurors is a question of fact. *See McCoy v. Lynaugh,* 874 F.2d 954, 960 (5th Cir. 1989); *Patton v. Yount,* 467 U.S. 1025, 1036 (1984). The factual determinations of the Texas Court of Criminal Appeals are presumed to be correct, and the petitioner has the burden of rebutting these determinations by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). This Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Fuller v. Johnson,* 114 F.3d 491, 500-01 (5th Cir.) (holding that a trial court's finding of juror bias is entitled to a presumption of correctness), *cert. denied,* 522 U.S. 963 (1997); *Granviel v. Lynaugh,* 881 F.2d 185, 187 (5th Cir. 1989) (stating that "[b]ecause of the difficulty of divining a prospective juror's state of mind, particularly on a cold record, we pay

deference to the trial court's factual determination"), *cert. denied,* 495 U.S. 963 (1990).

> The trial court found that Ms. Mackey exemplified the juror described in *Wainwright v. Witt*:
>
> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

469 U.S. at 424-25 (footnote omitted). The state court's characterization of Ms. Mackey as a vacillating juror is presumed correct because Medellin has not rebutted the finding with appropriate evidence. *See* 28 U.S.C. § 2254(e)(1). After reviewing the record, this Court is in agreement with Respondent's assertion that the state court's finding was reasonable in light of Ms. Mackey's responses. *See* 28 U.S.C. § 2254(d)(2). Because the trial court clearly could have been "left with the definite impression that [Ms. Mackey] would be unable to faithfully and impartially apply the law," *Witt,* 469 U.S. at 426, the trial court had a reasonable basis for granting the State's challenge for cause. In short, Medellin has failed to demonstrate that the state court disposition "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state

court proceeding." *See* 28 U.S.C. § 2254(d)(2). This claim is denied.

CERTIFICATE OF APPEALABILITY

Although Medellin has not yet requested a Certificate of Appealability ("COA"), the issue of a COA is likely to arise. This court may deny a COA *sua sponte*. *See Alexander v. Johnson,* 211 F.3d 895, 898 (5th Cir. 2000).[25] The Supreme Court has explained the standard for evaluating the issuance of a COA as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required

---

[25] The Supreme Court in *Miller-El v. Cockrell,* ___ U.S. ___, 123 S. Ct. 1029 (2003), recently reversed a case from the Fifth Circuit involving the COA standard. Prior to *Miller-El,* the Fifth Circuit resolved the question of COA in some cases by first determining whether a petitioner was entitled to relief and then denying COA because the appeal lacked merit. In *Miller-El,* the Supreme Court clarified a *circuit court*'s role in the COA process. The *Miller-El* Court found that a circuit court's COA analysis should not rest upon a "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El,* ___ U.S. at ___, 123 S. Ct. at 1039 (2003). Rather, "[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at ___, 123 S. Ct. at 1039 (emphasis added). Thus, the Supreme Court held that "[w]hen a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying the denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at ___, 123 S. Ct. at 1039. A district court's evaluation of the COA *sua sponte* does not raise the same jurisdictional concerns present in *Miller-El.* While *Miller-El* rejected the Fifth Circuit's review of the merits of a claim before that claim was properly before the circuit court, the same jurisdictional concern is not present when a district court evaluates a COA *sua sponte* before appeal. This Court clearly has jurisdiction to decide *sua sponte* whether a COA is warranted.

> to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also Miller-El,* ___ U.S. at ___, 123 S. Ct. at 1039-40.

The Court has carefully considered each of Medellin's claims. While the issues Medellin raises deserve scrutiny, the Court finds that each of his claims is foreclosed by clear, binding precedent. Under the appropriate standards, this Court concludes that Medellin has failed to make a "substantial showing of the denial of a constitutional right" with respect to each issue raised in his petition. 28 U.S.C. § 2253(c)(2). This Court concludes that Medellin is not entitled to a COA on any of his claims.

CONCLUSION

Based on the foregoing, the Court concludes that Medellin is not entitled to federal habeas relief. As a result, it is hereby

ORDERED that Respondent's Motion for Summary Judgment (Docket Entry # 16) is Granted. It is further

ORDERED that Jose Ernesto Medellin's Petition for Writ of Habeas Corpus is **DENIED**, this case is **DISMISSED WITH PREJUDICE**, and a Certificate of Appealability will not issue.

The Clerk will provide copies of this Order to the parties.

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY

John D. Rainey
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-4078

JOSE ERNESTO MEDELLIN,

Petitioner,

– v. –

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

FINAL JUDGMENT

(Filed June 26, 2003)

For the reasons stated in the Court's Order denying habeas relief and granting summary judgment in favor of Respondent, it is **ORDERED** that this case be dismissed with prejudice. The Court **DENIES** a certificate of appealability.

THIS IS A FINAL JUDGMENT.

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY
John D. Rainey
United States District Judge

No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice settled a dispute between the United States and Mexico by deciding, among other things, that the United States must grant "review and reconsideration" of the conviction and sentence of petitioner José Ernesto Medellín and 50 other Mexican nationals to determine if they have been prejudiced by the violation of their consular notification rights. It is undisputed that the United States has an international obligation to comply with the *Avena* judgment, regardless of the merits of that judgment, under three duly ratified treaties—the Optional Protocol to the Vienna Convention, the ICJ Statute, and the UN Charter—and the President has now determined that the United States will comply.

Texas argues that compliance with the judgment would intrude on the Article I lawmaking powers of Congress, but that is wrong for three separate and independently sufficient reasons. *First*, by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are *already* the "Law of the Land" by which all state and federal courts in this country are "bound." U.S. CONST. art. VI. Texas argues that the treaties are non-self-executing, but nothing in the treaty or any statute calls for legislation or any other action to make them effective. *See United States v. Rauscher*, 119 U.S. 407, 418-19 (1886). *Second*, even if the obligation to comply were non-self-executing, so that some further action were necessary to make it judicially enforceable, the President, who has authority under Article II to "take Care that the Laws be faithfully executed," has taken it. *Finally*, in any event, the President has independent authority under Article II to require compliance with the result of an international dispute-resolution process mandated by treaty. If the President's independent

foreign affairs authority allows him to settle disputes with foreign nations even *without* the assent of the Senate, *see, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981), he surely has the authority to settle a dispute by honoring a commitment as to which the Senate gave its advice and consent.

Nor would compliance with the *Avena* judgment and the President's determination intrude on the Article III judicial power. The obligation of the United States under the relevant treaties is to give effect to the *Avena* judgment in the particular cases it adjudicated. This Court has held that decisions of international tribunals created by treaty are "conclusive" and "not re-examinable" in U.S. courts by operation of the treaty. *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 212 (1828). Hence, compliance with *Avena* as a judgment in the cases that it adjudicated would not in any way compromise this Court's decision in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), as the controlling interpretation of the relevant treaty provision as a matter of U.S. law.

Finally, federalism principles do not bar compliance. By virtue of both the Supremacy Clause and the President's Article II authority, the *Avena* judgment supplies a federal rule of decision that preempts state law. Texas law specifically authorizes prisoners to bring habeas corpus petitions. Having opened its courts to hear proceedings of that general kind, Texas cannot avoid the application of federal law by imposing limitations that it labels "jurisdictional." *Howlett v. Rose*, 496 U.S. 356, 381 (1990). The President has not changed the jurisdiction of the federal or state courts in any way, but, at most, changed the substantive federal law those courts are to apply.

According to Texas and its *amici*, the Framers left the United States with a dysfunctional Constitution. Texas acknowledges that the Constitution allows the President to enter into treaties with the advice and consent of the Sen-

ate, that those treaties are binding on the United States as a whole, and that compliance with the *Avena* judgment is required by treaty. But as Texas sees it, the best the United States can do is *request* compliance, and Texas is free to say no. Texas is wrong. The Framers of the Constitution were acutely familiar with the resistance that treaties had met when they affected locally controversial issues, especially the treatment of foreign nationals and others under state property law and in the state criminal process, and the dangers that that resistance posed to the interests of the Nation as a whole. *See* Pet'r Br. 23-26 & nn.11-13. They solved the problem by the Supremacy Clause, making treaties judicially enforceable as preemptive federal law. On point after point, Texas asks this Court to overturn long-settled understandings about the role of treaties under the Constitution and to ignore dispositive precedents from this Court dating back to the founding. Far from allowing this Nation to make promises it cannot keep, the Constitution requires both this Court and the President to ensure that the United States keeps faith with the international obligations it undertakes.

I. Enforcement of the *Avena* Judgment and the President's Determination Would Not Intrude on the Article I Powers of Congress.

A. The Supremacy Clause Requires Courts to Enforce the United States's Obligation to Comply with the *Avena* Judgment.

The Supremacy Clause (which Texas does not mention until page 40 of its brief, and then barely addresses) makes treaties the "Law of the Land," and provides that the "Judges in every State" are "bound" thereby just as they are by federal statutes. U.S. CONST. art. VI. As this Court has made clear, once the President and Senate have ratified a treaty, *see* U.S CONST. art. II, § 2, courts "are bound . . .

to enforce in any appropriate proceeding the rights of persons growing out of that treaty," *Rauscher*, 119 U.S. at 419, and to " 'resort[ ] to the treaty for a rule of decision for the case before it *as [they] would to a statute*,' " *id.* (quoting *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884)) (emphasis added); *see also* Pet'r Br. 26-28. In other words, under the Constitution, the courts' role is to ensure "*the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations*." *Rauscher*, 119 U.S. at 418 (emphasis added). An agreement to abide by the result of an international adjudication is a treaty obligation like any other. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899); *Comegys*, 26 U.S. at 212. Thus, even without the President's determination, the Texas courts would be bound to give effect to commitments that the United States made, in the Optional Protocol, the UN Charter, and the ICJ Statute, to abide by the *Avena* judgment.

Texas misunderstands the constitutional design when it argues that the obligation in the relevant treaties is not self-executing and hence requires separate implementing legislation. Resp't Br. 14-15. This Court has held implementing legislation to be necessary to the enforcement of treaty obligations only when the treaty itself, the ratification instrument, or an act of Congress specifically require it.[1] But in the absence of that special circumstance, this

[1] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004) (giving effect to declaration of Senate in ratification instrument that treaty was non-self-executing); *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 49-50 (1913) (holding that Congress's enactment of implementing legislation effectively replaced treaty provisions with statutory provisions in domestic law); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-15 (1829) (interpreting treaty language as requiring legislation), *overruled by United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding same treaty provision self-executing after examining Spanish-language version). In this respect, a treaty is no different from

Court has from the beginning routinely enforced treaties under which foreign nationals have asserted rights, with no concern that the treaties might not be self-executing.[2]

Texas also argues that the President and Senate did not believe that the Vienna Convention would change U.S. law. Resp't Br. 24. That argument is irrelevant, because that is not the treaty at issue here. *See infra* Part II.A.[3] Here, the

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a statute: where a treaty by its terms requires Congress to pass subsequent legislation, the courts will not perform Congress's function, *see Foster*, 27 U.S. at 314-15; but the same is equally true when the effect of a statute is contingent on the adoption of subsequent legislation, *see, e.g.*, 2 U.S.C. § 632(a), or regulations, *see Dunlap v. United States*, 173 U.S. 65 (1899).

[2] *See, e.g., El Al Isr. Airlines v. Tseng*, 525 U.S. 155, 161-62 (1999); *United States v. Alvarez-Machain*, 504 U.S. 655, 659-61 (1992); *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 179-80 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 191-93 (1961); *Clark v. Allen*, 331 U.S. 503, 507-08 (1947); *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 161-62 (1940); *Cook v. United States*, 288 U.S. 102, 108-10 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 49-51 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 124-26 (1928); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345-46 (1925); *Asakura v. Seattle*, 265 U.S. 332, 341-42 (1924); *Johnson v. Browne*, 205 U.S. 309, 320-22 (1907); *Geofroy v. Riggs*, 133 U.S. 258, 266-68 (1890); *Wildenhus's Case*, 120 U.S. 1, 17 (1887); *Rauscher*, 119 U.S. at 418-20; *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884); *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1880); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 496 (1824); *Soc'y for Propagation of Gospel v. New-Haven*, 21 U.S. (8 Wheat.) 464, 489-90 (1823); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594, 599-600 (1818); *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259, 274-75 (1817); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813); *Higgonson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 251, 281-82 (1796).

[3] Texas is also incorrect. The ratifying history of the Vienna Convention demonstrates that the United States understood that that treaty would change U.S. law, *see Hearing Before Senate Committee on For-*

relevant obligation of the United States is its obligation under the Optional Protocol, the UN Charter and the ICJ Statute to comply with the *Avena* judgment. The *Avena* judgment, in turn, requires review and reconsideration of Mr. Medellín's conviction and sentence "within the overall judicial proceedings relating to the individual defendant concerned." *Avena*, ¶ 141 (Pet. App. 174a). That is not an obligation to enact legislation, but to take judicial action. *See, e.g., Rauscher*, 119 U.S. at 419 (quoting *Head Money Cases*, 112 U.S. at 599) (courts will enforce treaty rights "of a nature to be enforced in a court of justice").[4]

Texas makes the same mistake when it asserts that Mr. Medellín himself cannot invoke the treaties because they create no "individual rights." Resp't Br. 17-19. As long as a treaty "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," it will be

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eign Relations, S. EXEC. REP. No. 91-9, at 18 (1969) ("To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern."), and would do so in much the same way that earlier bilateral consular conventions had done, *see* Resp't Br. 24 (quoting *id.* at 2). The United States also clearly understood that its own understanding of the Vienna Convention would not necessarily be controlling, because it agreed to submit disputes over interpretation and application of the Convention to compulsory ICJ adjudication under the Optional Protocol. U.S. Br. 22.

[4] The passages cited by Texas from the legislative history of the U.S. adoption of its long-defunct blanket consent to compulsory ICJ jurisdiction, Resp't Br. 21-22, are irrelevant. As the context makes clear, those discussions pertain to remedies that a foreign government could pursue *in the international arena* if the ICJ issued a judgment against the United States that exceeded the scope of its jurisdiction. *See* 92 Cong. Rec. 10683, 10691-94 (1946); *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong. 140-43 (1946). They do not address which branch or level of U.S. government is responsible for compliance *under the United States's own domestic constitutional system* when the ICJ judgment is within the ICJ's jurisdiction. *See also* U.S. Br. 27.

applied as the rule of decision whenever those rights are at issue in a court of justice. *Rauscher*, 119 U.S. at 419 (quoting *Head Money Cases*, 112 U.S. at 598-99).[5] Again, this Court has from the beginning routinely enforced the Nation's treaty commitments whenever they bear on the life, liberty or property of litigants before the Court, without requiring any special magic words in the treaty. *See supra* note 2.[6] It is hard to imagine a right more "individual" to Mr. Medellín than the right not to be executed without the review and reconsideration of *his* conviction and

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[5] Congress may repudiate the treaty obligation by subsequent legislation and accept whatever international consequences that breach might have. *See, e.g., Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Head Money Cases*, 112 U.S. at 598-99. That is the import of the language that Texas quotes, but misinterprets, from the *Head Money Cases*, which was decided two terms before *Rauscher* and authored by the same justice. Resp't Br. 13 (quoting 112 U.S. at 598). The Court was merely acknowledging the consequences of the last-in-time rule: If Congress enacts legislation inconsistent with a treaty, the Court must apply the later-enacted statute regardless of the international consequences. But in the absence of such a statute, treaties have a dual character in the United States: They are, by international law, an agreement between nations, while our Constitution, diverging from British practice, also makes them part of domestic law. *See Rauscher*, 119 U.S. at 417-18; *Head Money Cases*, 112 U.S. at 598-99; *Foster*, 27 U.S. at 314.

[6] *See also Medellín v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting) ("[I]f a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed."). Texas fails to cite a *single* case in which this Court refused to enforce a treaty obligation on the basis that it did not involve an "individual right." Texas cites the decision of the Court of Appeals in *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-38 (D.C. Cir. 1988), but that case involved military operations, which no individual citizen would have standing to challenge regardless of whether the challenge was based on constitutional, statutory, or treaty grounds, and which present a nonjusticiable political question in any event. *See* ICJ Experts Br. 24 n.38.

sentence that are required "within the overall judicial proceedings relating to the individual defendant concerned" by a legally binding judgment addressing *his* own case. *See Avena* ¶ 141 (Pet. App. 174a).[7]

B. The President Has the Authority to Execute the United States's Obligation to Comply with the *Avena* Judgment.

This Court need not reach the issue of whether the *Avena* judgment is enforceable in U.S. courts by virtue of the treaties and the Supremacy Clause alone, because the President has, in any event, exercised his power to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; *see* Pet'r Br. 28-33. Contrary to certain Texas *amici*, Const'l & Int'l Scholars Br. 11-13, this Court has already settled that the President's power includes the authority to use the necessary means to enforce a treaty, even though those means would be beyond his power in the absence of a treaty. *See Valentine v. United States*, 299 U.S. 5, 8-9 (1936) (President may extradite suspect when authorized by treaty or statute, but not otherwise); Pet'r Br. 28-33; Fmr. U.S. Diplomats Br. 6-7; *see also* U.S. Br. 26-27. And contrary to Texas's apparent assumption, *e.g.*, Resp't Br. 13-16, when a dispute to which the United States is a party has been submitted to binding resolution, the "law" that the President must execute is the legal obligation to enforce the final award, regardless of whether he agrees with its mer-

[7] Though the point is not at issue here, *see infra* Part II.A, the underlying right to be informed of the right to contact one's consulate also belongs to the individual foreign national by the plain and unambiguous terms of the Vienna Convention, and the negotiating history confirms that that was the parties' understanding. *See, e.g.*, Fmr. Diplomats Br. 13-14 & nn.10-11; *Jogi v. Voges*, 480 F.3d 822, 828-35 (7th Cir. 2007); *Cornejo v. County of San Diego*, No. 05-56202, 2007 U.S. App. LEXIS 22616, *34-57 (9th Cir. Sept. 24, 2007) (Nelson, J., dissenting); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 494, ¶ 77 (June 27). *But see, e.g., Cornejo, supra*, at *7-30 (majority opinion).

its. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 611-12 (1838).[8]

Texas does not even attempt to address *Sanitary District v. United States*, 266 U.S. 405 (1925) (cited in Pet'r Br. 29, 33; U.S. Br. 19), in which this Court confirmed the Executive's power to sue a state agency in order to execute "treaty obligations to a foreign power" to regulate the use of water from Lake Michigan, even in the absence of a statute authorizing suit, and even where no individual right or proprietary right of the United States was involved. *Id.* at 425-26. If the President can execute a treaty obligation by suing on his own, he can surely execute the same obligation by directing compliance in others' suits in which the obligation is invoked. *See* U.S. Br. 17-18. Here, in any event, the United States has appeared as *amicus* both in Texas and before this Court in order to achieve compliance, and no purpose would be achieved by requiring that it initiate a separate action. U.S. Br. 19.[9]

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[8] Contrary to what Texas states, Resp't Br. 33, the power of the United States to enforce the *Avena* judgment is consistent with the position that the United States took in *Breard v. Greene*, 523 U.S. 371 (1998). That case involved an "indicat[ion]" of provisional measures, ICJ Statute art. 41, which is not a final decision and which the United States regarded as nonbinding by the terms of the ICJ Statute. *See* Pet'r Br. 22, n.10.

[9] Texas also argues that the Court must look to the UN Charter for any authority to comply with the *Avena* judgment. Resp't Br. 19-24. But even if that were so, it would not lead to the result that Texas urges. Article 94(1) of the Charter states that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Pet. App. 81a. If that language, rather than the Supremacy and Take Care Clauses, had to be construed to designate the United States official responsible for compliance, *but see supra* Part I.A, that official could only be the President, together with the Executive Branch officials acting at his direction, as they are the sole authorized representatives of the United States before all organs of the UN and in international relations generally. *See* U.S. Br. 12-13; Pet'r Br. 40-41.

C. The President Has the Authority to Order Compliance with the *Avena* Judgment in the Exercise of His Power to Conduct Foreign Affairs.

This Court also need not reach the question of whether the President may enforce the *Avena* judgment under his power to take care that the laws be faithfully executed, because the President's independent foreign affairs authority more than suffices to require compliance with the *Avena* judgment. *See* Pet'r Br. 34-42; U.S. Br. 4-6, 9-21.

First, Texas attempts to distinguish *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore*, 453 U.S. at 679, 682-83; *United States v. Pink*, 315 U.S. 203, 223 (1942); and *United States v. Belmont*, 301 U.S. 324, 330-331 (1937), on the ground that in that "narrow subset of cases" the President acted only to settle "civil claims between individuals and foreign governments (or foreign companies)." Resp't Br. 27-29. But nothing in the reasoning of those cases supports such a hypertechnical reading; to the contrary, they squarely establish the President's power to settle disputes with foreign governments as a component of his constitutional authority to conduct the Nation's foreign affairs. Pet'r Br. 35-36, 38-39. Contrary to Texas's supposition, moreover, those cases were not all about private civil claims for money or property. The agreement in *Dames & Moore*, for example, secured the release of the American hostages held at the U.S. Embassy in Tehran and settled government-to-government as well as private claims, and *Garamendi* dealt not with private claims but with a disclosure obligation under California insurance law. Surely Texas does not mean to suggest that the President has less authority when he seeks to "protect the interests of the United States citizens detained abroad, promote the effective conduct of foreign relations, and underscore the United States' commitment to

the rule of law," than when he settles private property claims. U.S. Br. 9.

Second, Texas and some of its *amici* argue that the President has contravened the "policy preferences" of Congress that they purport to glean from the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA). Resp't Br. 25-26; *see also* Va. Br. 3, 9, 11-12. But AEDPA says nothing about the President's authority under Article II to enforce treaty obligations in state courts. AEDPA also does nothing to alter the state courts' obligation to apply federal law or the scope of this Court's review of those decisions on certiorari; it only limits collateral review of those decisions on federal habeas corpus. Indeed, Texas argues as if AEDPA were license for state courts to disregard federal law, whether treaty or otherwise. To the contrary, that statute rests on the assumption that they will faithfully apply federal law. *See, e.g., Carey v. Musladin*, 127 S. Ct. 649, 653-54 (2006); *Medellín v. Dretke*, 544 U.S. 660, 680 (2005) (O'Connor, J., dissenting). If anything, the President's determination dovetails with the scheme established by AEDPA, which recognizes state courts as the primary forum for review of convictions and sentences. And in any event, vague "policy preferences" of the sort Texas posits are far from sufficient to attribute to Congress an intent to breach a treaty. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Finally, Texas asserts that to allow the President to decide that the United States will comply with the *Avena* judgment "could, in turn, open the door to a host of potential abuses from future Presidents," because the Court could devise no "workable limiting principle." Resp't Br. 43-44. That same objection could have been made to each of *Garamendi*, *Dames & Moore*, *Belmont*, and *Pink*; but

that did not cause this Court to deny the President authority that the Constitution conferred. Instead, the Court has come to evaluate each exercise of that authority by reference to the categories first identified in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In acting to fulfill a legal commitment made by the treatymaking political branches, the President acted at the zenith of his authority. Pet'r Br. 38; U.S. Br. 10. Indeed, this Court's precedents make clear that in the exercise of his independent foreign affairs authority, the President can "effect[ ] a change in the substantive law" applicable to a given case, *Dames & Moore*, 453 U.S. at 685; here, he acted merely to reiterate a rule of decision that, as a treaty obligation, already had the status of federal law. *See supra* Part I.A.

II. Enforcement of the *Avena* Judgment and the President's Determination Would Not Intrude on the Article III Powers of the Federal Courts.

A. This Case Is About Enforcement of a Judgment Undisputedly Binding by Treaty, Not Interpretation of the Vienna Convention.

Texas and its *amici* argue that enforcement of the *Avena* judgment would usurp the role of this Court to interpret federal law because that judgment is inconsistent with the interpretation of Article 36 of the Vienna Convention in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). This case, however, is not about the interpretation of that provision, but about the enforcement of a judgment adjudicating an individual's rights pursuant to treaties making that adjudication final and binding. Pet'r Br. 19-22. Hence, Texas's argument is inconsistent with this Court's teaching that decisions of international tribunals established by treaty must be given effect in the courts of the United States whether or not those courts agree with the result.

In *Comegys v. Vasse*, 26 U.S. at 212-13, the Court explained in an opinion by Justice Story that a judgment of a U.S.-Spain binational tribunal was "conclusive and final" and was "not re-examinable" in the courts of the United States. *See also Kinkead v. United States*, 150 U.S. 483, 495 (1893) (explaining *Comegys*); Laingen Br. 12-13 & nn.23-25; *cf. Auffmordt v. Hedden*, 137 U.S. 310, 329 (1890) (enforcing appraiser's award in favor of United States; rejecting constitutional challenge to statute making award conclusive); *Kendall*, 37 U.S. at 611-12 (enforcing domestic arbitral award against United States). In a case of this kind, the law that must be enforced is the commitment to treat the result as binding—not the underlying law as the courts might independently interpret it. *See Auffmordt*, 137 U.S. at 329; *Kendall*, 37 U.S. at 611-12; *Comegys*, 26 U.S. at 212. Hence, applying the *Avena* judgment and the President's determination as the rule of decision here is fully consistent with this Court's "duty 'to say what the law is,' " *Sanchez-Llamas*, 126 S. Ct. at 2684 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), as well as this Court's observations that "[t]he ICJ's decisions have '*no binding force* except between the parties and in respect of that particular case,' " and are "not binding precedent *even as to the ICJ itself*." *Id.* (quoting ICJ Statute art. 59) (Court's emphasis).

Texas argues, by supposed application of the domestic law of *res judicata*, that the *Avena* judgment cannot be enforced because Texas and Mr. Medellín were not parties before the ICJ. Resp't Br. 19-20. Where international relations are concerned, however, the states of the union have no separate existence; the national government speaks and acts for the nation as a whole and all its constituent parts. *See, e.g., Japan Line Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979); *Belmont*, 301 U.S. at 331. Conversely, Mexico, which has the authority to represent the interests of its nationals in international relations, asserted the rights of

Mr. Medellín and each of the other affected Mexican nationals before the ICJ in *Avena*, and the ICJ expressly adjudicated those rights in its judgment. *See* ICJ Experts Br. 10-17.

In any event, Texas misses the point when it attempts to frame the issue as one of *res judicata* between the *Avena* parties. The decision of an international tribunal "within the scope of [its] authority, is conclusive and final" not by operation of the domestic common law of *res judicata*, but by "[t]he object of the treaty" to give the tribunal authority to finally resolve a question in dispute between two nations. *Comegys*, 26 U.S. at 212; *see also Kinkead*, 150 U.S. at 495; *La Abra*, 175 U.S. at 461-63. Thus, as this Court held in *Comegys*—rejecting essentially the same argument that Texas makes here—the fact that the parties before the Court may differ from the parties who appeared before the international tribunal is simply "not . . . material" to the conclusive effect of the judgment. 26 U.S. at 212.

B. It Is Long Settled That the Treaty Power Encompasses the Power to Submit Disputes to Binding Adjudication by an International Tribunal.

Texas and its *amici* also err when they argue that Article III prevents the United States from allowing international tribunals to decide treaty questions. *First*, if Texas means to argue that Article III bars enforcement of a decision of a court *other than* one of the United States, involving a question of U.S. federal law arising in a case within its jurisdiction, it is wrong. For example, this Court has held that, by statute, state-court judgments must be given preclusive effect even when an Article III federal court would be prevented from deciding the merits of a federal question within exclusive federal jurisdiction. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374-75 (1996). Judgments of foreign courts and domestic and foreign arbitral tribunals are also routinely enforced by statute and

common-law principles without reexamining the merits.[10] Judgments of international tribunals are treated no differently. *See Comegys*, 26 U.S. at 212.

Second, if Texas means to argue that the ICJ must somehow be treated as if it were a creature of the U.S. government alone, it would not follow that its adjudication of disputes violates Article III. This Court has repeatedly upheld the delegation of adjudicative authority to non-Article III bodies.[11]

Finally, if Texas means to argue that Article III bars the President, with the advice and consent of the Senate, or

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[10] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629, 632-36 (1985) (by statute, federal courts must enforce decision of commercial arbitrators in international case on questions of nonwaivable federal law within exclusive jurisdiction of federal courts); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 279 (1932) (statute requiring federal courts to enforce arbitral awards does not violate Article III); *Auffmordt*, 137 U.S. at 329 (statute making customs appraiser's report binding does not violate Article III); *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (foreign judgments, if entitled to comity, will be enforced without reexamining merits); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 747-48 (1832) (giving *res judicata* effect to judgment of Spanish court affecting application of treaty).

[11] *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 198-200 (1982) (hearing officer appointed by private corporation); *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 455 (1977) (administrative agency); *Ex parte Bakelite Corp.*, 279 U.S. 438, 458-59 (1929) (non-Article III court); *Auffmordt*, 137 U.S. at 326-29 ("merchant appraiser"). Specifically, this Court has held that non-Article III courts may hear disputes under laws made pursuant to "powers conferred by the Constitution respecting treaties," *see, e.g., Bakelite*, 279 U.S. at 451 (citing cases), and other disputes involving "public rights," *see, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 & n.8 (1989) (suit by individuals against the U.S. government); *La Abra*, 175 U.S. at 456 (suit by one nation or its nationals against the government of another under a treaty). *See also* Pet'r Br. 39 n.17. If anything, a proceeding by a foreign government on behalf of its nationals is even *more* "public" than a suit directly by an individual.

indeed the President alone, acting pursuant to his independent authority, to agree to submit disputes to international adjudication, it would be asking this Court to overturn two centuries of practice and precedent. Though treaty obligations are incorporated into U.S. domestic law by the Supremacy Clause, they are not *only* questions of U.S. law, but also law for other nations as well, to be interpreted in light of the plain language of the treaty and the shared understanding of the parties. *See, e.g.*, *Sumitomo*, 457 U.S. at 180. It has long been understood that the judges or commissioners appointed under those treaties do not function as judicial "officers" of the United States or, for that matter, the opposing nation; rather, they act as independent "arbitrators between the two countries." Alexander Hamilton, THE DEFENCE No. 37 (1796), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed. 1974).

From the earliest days of the Constitution, and even earlier, the United States has made numerous treaties calling for submission of disputes to international tribunals. Pet'r Br. 39 n.17 (citing Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007)). Today as well, dozens if not hundreds of international agreements requiring submission of private or public disputes to binding international adjudication are in force. *See, e.g.*, ICJ Experts Br. 18 & n.25; Fmr. U.S. Diplomats Br. 25-28 & nn.26-27; Mex. Br. 3 & n.2. The disputes adjudicated under such treaties have affected both the rights of individuals and the sovereign interests of the Nation and its individual states. *See, e.g.*, ICJ Experts Br. 12-21. Once again, Texas attacks long-settled understandings by suggesting that Article III puts this vital exercise of the treatymaking and foreign affairs power beyond the authority of the United States or prevents the United States from carrying into effect its results.

III. Enforcement of the *Avena* Judgment and the President's Determination Would Not Violate Principles of Federalism.

Contrary to Texas's claim that the President's determination "[a]lter[s] the [s]tructure of the Texas [j]udiciary," Resp't Br. 39, Texas has the same courts today, with the same jurisdiction, as it did the day before the President issued his determination. The only thing that has changed, if anything, is the law that those courts must apply on the merits. *See Dames & Moore*, 453 U.S. at 684-85 (executive agreement that courts must decline to hear claims involving Iran changed only substantive law, not jurisdiction).

Not even one of the justices of the Texas Court of Criminal Appeals (CCA) suggested that that court lacked jurisdiction over Mr. Medellín's petition. Rather, the CCA dismissed the petition based on a state statute limiting subsequent habeas applications. Pet. App. 64a. The CCA clearly recognized that federal law *could* preempt this state-law procedural bar, and that the CCA would have the power to grant relief if it did. It decided, however, that under federal law, the federal government had not effectively exercised that preemptive power through the proper procedures and organs of government. Pet. App. 27a, 46a-47a. This, alone, should be sufficient to dispose of any suggestion that Texas lacks courts "fully competent to provide the remedies the federal [law] requires." *Howlett v. Rose*, 496 U.S. at 378.

While Texas may label its procedural bar "jurisdictional," in the sense of non-waivable, "[t]he fact that a rule is denominated jurisdictional does not provide a [state] court an excuse to avoid the obligation to enforce federal law if the rule does not reflect . . . concerns of power over the person and competence over the subject matter." *Howlett*, 496 U.S. at 381. As long as Texas has courts that are capable of adjudicating "this same type of claim," they

may not hold themselves to be without jurisdiction simply because state law would not allow them to entertain the claim. *Testa v. Katt*, 330 U.S. 386, 394 (1947); *accord, e.g., Howlett*, 496 U.S. at 378-79; *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912). And treaties, no less than other federal law, can preempt state-law procedural bars. *Hopkirk v. Bell*, 7 U.S. at 456-57 (treaty preempted state statute of limitations); *see also Missouri v. Holland*, 252 U.S. 416, 432 (1920) (treaty power not limited to Article I powers of Congress).

Texas law recognizes a cause of action in habeas corpus to review a conviction. *See* TEX. CRIM. PROC. CODE arts. 11.01-11.65.[12] Thus, Texas law supplies the cause of action, while the *Avena* judgment and the Presidential determination provide the substantive content of that claim and preempt any state-law procedural bar that functions as the state's defense to that claim. While states ordinarily "may apply their own neutral procedural rules to federal claims," they may not do so when "those rules are pre-empted by federal law." *Howlett*, 496 U.S. at 372. This case is not one in which a state court has refused to hear, for example, an untimely due process or ineffective assistance claim. Rather, unlike those cases, the federal-law obligation under the *Avena* judgment and the President's determination is to grant "review and reconsideration" on the merits to deter-

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[12] Texas *amici* err by suggesting an Eleventh Amendment bar. Va. Br. 18-19 n.12 (citing *Alden v. Maine*, 527 U.S. 706 (1999)). Habeas corpus petitions are not suits against the state for Eleventh Amendment purposes, *see, e.g., Ex parte Royall*, 117 U.S. 241, 249 (1886); in any event, Texas voluntarily entertains such petitions. Moreover, the federal preemption Texas challenges arises only to avoid Texas's procedural-bar defense within that state-recognized proceeding, and therefore does not implicate Eleventh Amendment concerns. *See, e.g., Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885).

mine if Mr. Medellín suffered prejudice from the breach of Article 36.[13]

IV. The President's Determination Is Binding by Its Terms.

Texas denies the obvious by suggesting that the President's determination should be read "as a request, and not a command." Resp't Br. 47. That instrument is written entirely in mandatory, not precatory, terms: "pursuant to the *authority* vested in me as President . . . the United States *will discharge* its international obligations . . . by having state courts *give effect*" to the *Avena* judgment. Pet. App. 187a (emphasis added). Were there any doubt, the briefs the United States has filed before this Court, signed by both the Solicitor General and the Legal Advisor to the State Department, would remove it. *See, e.g.*, U.S. Br. 25-26; *Garamendi*, 539 U.S. at 423 & n.13 (treating congressional testimony of executive officers as conclusive of President's policy).

V. Texas Has Not Complied with Either the *Avena* Judgment or the President's Determination.

Texas argues, as it did for the first time in its brief in opposition to the petition, that the state trial court on collateral review has already complied with *Avena* in Mr. Medellín's case years before *Avena* was even decided, ren-

[13] Texas and some of its *amici* invoke the "anti-commandeering doctrine" of *Printz v. United States*, 521 U.S. 898, 935 (1997); but as Texas acknowledges, Resp't Br. 41, this Court made clear in *Printz* itself that that doctrine does not apply to state courts. 521 U.S. at 928-929. Texas offers no reason for this Court to overrule its longstanding precedents (*e.g., Howlett; Testa; Mondou*), to introduce a new doctrine into an area that those cases fully address, or to upset long-settled understandings of the relationship between state and federal courts. *See, e.g., Printz*, 521 U.S. at 907; *Levitt v. Fax.com, Inc.*, 857 A.2d 1089, 1094 (Md. 2004).

dering the questions presented moot. Resp't Br. 49-50. To the contrary, as petitioner explained at the petition stage, the *Avena* judgment itself rejected the contention that the relevant obligations had already been complied with in Mr. Medellín's case, and the President's determination makes clear that the obligation of review and reconsideration is prospective. Reply to Br. in Opp. 3-5. In any event, as the United States pointed out at oral argument in the CCA, *see id.* at 5 n.1, the *Avena* judgment expressly rejected the approach, taken by the state trial court in Mr. Medellín's case, of collapsing treaty rights into constitutional rights instead of considering them on their own terms, so its findings could not possibly have satisfied *Avena*. *See id.* at 4-5. Finally, even if the adequacy of the state trial court's review were somehow still open for debate, Texas's argument would not amount to an issue of mootness, but at best an additional, disputed, fact-dependent merits issue that was not passed on below, *see id.* at 2-3, and is beyond the scope of the questions presented here.

CONCLUSION

Petitioner respectfully requests that the Court reverse the judgment of the Texas Court of Criminal Appeals and remand petitioner's case for review and reconsideration consistent with the *Avena* judgment and the President's determination.

Respectfully submitted,

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September 27, 2007

764

36 pgs

FILED
JUN
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-984

In the Supreme Court of the United States

JOSE ERNESTO MEDELLIN, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

In the *Case Concerning Avena & Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31) (*Avena*), the International Court of Justice decided that, to remedy violations of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, in the cases of 51 named Mexican nationals, including petitioner, the United States must provide review and reconsideration of their convictions and sentences through a judicial process to determine whether the treaty violations caused actual prejudice, without regard to procedural default rules. On February 28, 2005, President Bush determined that the United States would comply with its international obligations under *Avena* by having state courts provide review and reconsideration to those 51 Mexican nationals. The Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the President's determination or the *Avena* decision. The questions presented are:

1. Whether the President of the United States acted within his authority under the treaties, statutes, and Constitution of the United States when he determined that the United States will comply with its treaty obligations by having state courts give effect to the *Avena* decision in the cases of the 51 Mexican nationals addressed in the decision.

2. Whether, absent the President's determination, a private party could enforce the *Avena* decision in state court.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the President validly determined that the United States will discharge its international obligations under the decision of the International Court of Justice (ICJ) in *Case Concerning Avena & Other Mexican Nationals* (*Mex.* v. *U.S.*), 2004 I.C.J. 128 (Mar. 31) (*Avena*), by having state courts give effect to the *Avena* decision. It also presents the question whether, absent the President's determination, the ICJ's decision would be privately enforceable in state courts. The United States has a substantial interest in the resolution of those issues.

STATEMENT

1. In 1969, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. See 115 Cong. Rec. 30,997. Article 36 of the Vienna Convention, 21 U.S.T. 100-101, 596 U.N.T.S. 292-293, concerns the ability of a foreign national to have consular officials notified of his detention.

In 1969, the United States ratified an Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, Art. I. See 21 U.S.T. 77, 700 U.N.T.S. 368. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." 21 U.S.T. at 326, 596 U.N.T.S. at 488. Any party to the Optional Protocol may bring such a dispute with another party to the Protocol before the ICJ. *Ibid.* On March 7, 2005, the United States withdrew from the Optional Protocol. *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2675 (2006). Article 94 of

the Charter of the United Nations (U.N. Charter), 59 Stat. 1051, another Treaty ratified by the United States, provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

2. Petitioner, a Mexican national, was convicted of participating in the gang rape and murder of two teenage girls and sentenced to death. Pet. App. 2a. On direct review, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Ibid.*

Petitioner then filed a habeas action in state court, claiming that Texas's failure to inform him of his rights under the Vienna Convention required reversal of his conviction and sentence. Pet. App. 2a. The state trial court rejected that claim on several grounds, including that petitioner's failure to raise it at trial resulted in procedural default. *Ibid.* The Texas Court of Criminal Appeals affirmed. *Id.* at 2a-3a.

3. Petitioner then sought federal habeas corpus, based on the Vienna Convention. Pet. App. 3a. The district court rejected that claim. *Ibid.* While petitioner's application for a certificate of appealability was pending in the Fifth Circuit, the ICJ decided *Avena*. *Id.* at 86a-186a.

In *Avena*, the ICJ determined that the United States had violated Article 36(1)(b) of the Vienna Convention, 21 U.S.T. 101, 596 U.N.T.S. 292, by not informing 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. Pet. App. 183a, para. 153(4) and (5). The ICJ determined that the appropriate remedy for those violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." *Id.* at 185a, para. 153(9). The ICJ indicated that review and reconsidera-

tion should occur through a judicial process, *id.* at 174a, para. 140-141, that the relevant inquiry was whether the treaty violation caused actual prejudice to the defendant, *id.* at 165a, para. 121, and that procedural default rules could not bar that review. *Id.* at 160a-161a, para. 113.

The Fifth Circuit denied petitioner's application for a certificate of appealability, holding that petitioner had procedurally defaulted his Vienna Convention claim and that the Vienna Convention does not confer an individually enforceable right. *Medellin* v. *Dretke*, 371 F.3d 270, 280 (2004). This Court granted review. See *Medellin* v. *Dretke*, 543 U.S. 1032 (2004).

Before the Court heard argument in *Medellin*, the President determined that "the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Pet. App. 187a. Relying on the President's determination and *Avena*, petitioner filed an application in the Texas Court of Criminal Appeals for state habeas corpus review. *Id.* at 4a-5a. Because that state-court proceeding might provide petitioner with the review and reconsideration he sought, and because threshold procedural issues could independently bar federal habeas review, this Court, after argument, dismissed the petition for a writ of certiorari in *Medellin* as improvidently granted. *Medellin* v. *Dretke*, 544 U.S. 660, 664 (2005) (per curiam).

4. The Texas Court of Criminal Appeals dismissed petitioner's application, holding that the *Avena* decision and the President's determination "do not constitute binding federal law" and therefore do not preempt the State's prohibition against the filing of successive habeas corpus applications. Pet. App. 64a.

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals erred by failing to implement the President's determination to have state courts give effect to *Avena*. While the ICJ's decision in *Avena* is not privately enforceable in its own right, the President's determination that the Nation will comply with *Avena* falls within his authorized power to effectuate our treaty obligations.

I. A. By virtue of the Optional Protocol and the United States' ratification of the U.N. Charter, the United States has an international law obligation to comply with the ICJ's decision in *Avena*. That decision requires the United States courts to provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals addressed in that decision. The President disagrees with the legal interpretations underlying the ICJ's decision, and was faced with a decision whether to comply with the United States' treaty obligations. But the United States has compelling interests in ensuring reciprocal observance of the Vienna Convention by treaty partners who detain U.S. citizens, promoting foreign relations, and reaffirming the United States' commitment to the international rule of law. Those competing concerns justified the President in determining to discharge the Nation's obligations under *Avena*, while withdrawing from the Optional Protocol to prevent the ICJ from imposing similar obligations on the United States in the future.

B. The President's actions are justified by his authority to implement the Optional Protocol and the U.N. Charter. That authority should be construed in light of the President's well-established constitutional and statutory powers in the realm of foreign affairs and his historically accepted lead role in responding to ICJ decisions. Presidential foreign-affairs actions taken pursuant to treaties, like Presidential actions taken pursuant to a statute, should be upheld unless the fed-

eral government as a whole lacks authority to deal with the matter. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring).

Here, several factors support the view that the President is authorized to determine whether and how to comply with the ICJ's decision. First, the President is constitutionally charged with making and is uniquely qualified to make the prompt and sensitive determinations involved. Second, the President has recognized authority to resolve disputes with foreign nations over individual claims, and to establish binding rules of decision that preempt contrary state law. See, *e.g. American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Those powers make him the logical figure to take the lead in responding to treaty-authorized dispute resolutions by the ICJ. Third, federal statutes acknowledge the President's role in representing the Nation in the ICJ and the U.N. Security Council—the only forum in which the prevailing party in the ICJ can seek enforcement in the event of non-compliance—and to protect Americans abroad. Fourth, the President in a variety of litigation contexts has provided the source of law in controversies touching foreign relations and can bring suit in our courts to enforce treaty obligations. And fifth, the President has taken the responsibility to comply (or not to comply) with past ICJ decisions, and Congress has acquiesced in those actions.

C. The court below did not agree on a single rationale for setting aside the President's determination. But none of the separate opinions offered a persuasive basis for doing so. Contrary to the opinions below, the President's action does not intrude on the independence of the judiciary. This Court's decision in *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2675 (2006), authoritatively interpreted the Vienna Convention generally, but the President's action does not supplant that interpretation. It simply provides for the enforcement of a

judgment as to 51 specific individuals—a judgment with which the United States is obligated by treaty to comply. The law of judgments has long held that a domestic court may recognize a decision as binding, without adopting—indeed, while disagreeing with—its legal reasoning. The President's action is of the same character.

Nor is the President's action invalid because it is not reflected in a new executive agreement with Mexico. The United States is already party to treaties that required it to submit Vienna Convention disputes to the ICJ and to comply with its decisions. The President's freedom of action would be sharply curtailed, and the Nation hamstrung, if the President were required to secure a foreign government's agreement before he could bring the Nation into compliance with treaty-based obligations.

The President's action is not invalid on the theory that it unduly intrudes on federalism. The Supremacy Clause makes the national government's action binding on the States when it acts under a valid treaty. In any event, the compelling national interests served by the President's determination outweigh the relatively modest intrusion on State interests here. The President's determination is precisely tailored to achieve compliance with *Avena*: it requires state courts to provide review and reconsideration; it does not foreordain outcomes.

Finally, the President's memorandum is sufficient to create a binding legal rule. Nothing in the Constitution requires a Presidential determination to take a particular form in order to preempt conflicting state requirements.

D. The State objects that the treaty obligation to comply with *Avena* is not self-executing, and it suggests the President therefore cannot implement it domestically. But while the obligation to comply with *Avena* is not self-executing, that simply means that it may not be privately enforced in courts of the United States without further Presidential or congres-

sional action. The State also errs in suggesting that the U.N. Charter means that only in the Security Council may an ICJ decision be enforced. That remedy allows a prevailing nation in the ICJ to seek enforcement of the ICJ decision; it does not speak to the President's power domestically to comply with the Nation's treaty-based obligations so as to avoid an enforcement action in the Security Council.

II. Absent a Presidential determination, the ICJ's decision in *Avena* could not be enforced in this Nation's courts. It is the President who is authorized to determine whether and how the United States will comply with an ICJ decision. Permitting direct judicial enforcement would circumvent the President's critical role in deciding whether *or not* to comply with our treaty obligations and would inappropriately inject the judiciary into sensitive matters of foreign affairs. The relevant treaties do not contemplate such direct enforcement, and the *Avena* decision by its terms calls for a determination how it should be applied—a determination that the courts cannot make for the United States.

ARGUMENT

I. THE PRESIDENT VALIDLY DETERMINED TO HAVE STATE COURTS GIVE EFFECT TO AVENA

The United States has a treaty-based obligation to comply with the *Avena* decision, and the President validly discharged that obligation by having state courts give effect to that decision. The Texas Court of Criminal Appeals erred in holding otherwise.

A. The United States Has An Obligation To Comply With *Avena*, And The President Has Determined That It Is In The Nation's Interest To Fulfill That Obligation

1. Through ratification of the Optional Protocol, the United States agreed that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" could be submitted to the ICJ for binding resolution. Optional Protocol Art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. Pursuant to the Optional Protocol, Mexico asked the ICJ to resolve a dispute between it and the United States over the meaning of the Vienna Convention as applied to the convictions and sentences of 51 Mexican nationals who had not been advised of their right to consular notification. The ICJ resolved that dispute by requiring review and reconsideration of the convictions and sentences of those 51 individuals through a judicial process that would determine whether the failure to receive notification prejudiced the defense.

Through ratification of the U.N. Charter, the United States agreed that an ICJ decision would have "binding force * * * between the parties and in respect to that particular case." Statute of the International Court of Justice (ICJ Statute) Art. 59, 59 Stat. 1062. It further agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter Art. 94(1), 59 Stat. 1051. As a result of those treaty provisions, the ICJ decision in *Avena* has "binding force," and the United States has an international law obligation to "comply with the decision" by providing judicial review and reconsideration to 51 Mexican nationals.[1]

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[1] The term "decision" refers to what in United States practice would be called the judgment, and that is the only part of an ICJ opinion with which the United States must comply. The United States is not obligated to acquiesce in

2. The President does not agree with the ICJ's interpretations of the Vienna Convention. Nonetheless, the President recognized that the United States had, pursuant to the Optional Protocol, agreed to resolution of the dispute by the ICJ, and that it has an obligation under the U.N. Charter to comply with that decision. To discharge that obligation—and thereby to protect the interests of United States citizens detained abroad, promote the effective conduct of foreign relations, and underscore the United States' commitment to the rule of law—the President determined to have state courts perform the review and reconsideration required by the *Avena* decision. At the same time, the President recognized that permitting disputes of this kind to be resolved authoritatively by the ICJ can result in harm to this country's interests. Accordingly, after announcing his decision to comply with *Avena*, the President withdrew from the Optional Protocol, foreclosing the possibility that the ICJ would apply its erroneous interpretation against the United States in future cases. As we now demonstrate, the President's carefully calibrated response to *Avena* falls within the President's authority to effectuate and direct compliance with the relevant treaties.

B. The President's Determination Is Authorized By The Optional Protocol And The U.N. Charter As Informed By The President's Constitutional And Statutory Powers

In assessing the scope of Presidential power, the Court has found Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), to be "analytically useful." *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981). In that opinion, Justice Jackson classified executive action into three familiar categories.

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the ICJ's legal reasoning, and it has not acquiesced in the legal reasoning in *Avena*. See *Sanchez-Llamas*, 126 S. Ct. at 2685.

First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Action within that first category is constitutional, unless the federal government "as an undivided whole lacks power." *Id.* at 637. Second, "[w]hen the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Ibid.* In that second category, "congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Ibid.* Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Ibid.* In that third category, "[c]ourts can sustain exclusive presidential control * * * only by disabling the Congress from acting." *Id.* at 637-638.

The Court has not specifically addressed how to assess Presidential action under the authority of a treaty. But it seems clear that when the President acts pursuant to a duly ratified treaty and his own constitutional authority, he acts with the full authority of the United States, and his authority is at its zenith. A treaty, after all, requires ratification by two-thirds of the members of the Senate, U.S. Const. Art. II, § 2, Cl. 2, and therefore Presidential action that is expressly or implicitly authorized by a treaty is akin to Presidential action that falls within the first category. Such action is valid unless the federal government "as an undivided whole lacks power." *Youngstown*, 343 U.S. at 637 (Jackson, J., concur-

ring); see *Wilson* v. *Girard*, 354 U.S. 524 (1957) (upholding the President's executive agreement to permit the trial of a United States citizen by Japanese authorities on the ground that it was implicitly authorized by a treaty).

Under that analysis, the President acted within his authority when he determined to have state courts give effect to *Avena*. The Optional Protocol and the U.N. Charter create an obligation to comply with *Avena*, and those treaties implicitly give the President authority to implement that treaty-based obligation on behalf of the Nation. That understanding of the Optional Protocol and the U.N. Charter is informed by the President's established constitutional and statutory powers.[2]

1. The President's constitutional role makes him uniquely suited to respond to an ICJ decision

Determining whether and how to comply with an ICJ decision raises sensitive foreign policy issues that the President's constitutional role uniquely qualifies him to resolve. It therefore makes sense to read the Optional Protocol and U.N. Charter to allow the President to decide whether and how to comply with an ICJ decision.

This case illustrates the kind of sensitive foreign policy issues that bear on compliance with and implementation of an ICJ decision. Among the issues raised are: (1) the importance of securing reciprocal protection of Americans detained abroad; (2) the need to avoid harming relations with foreign governments, including Mexico; and (3) the interest in reinforcing the United States' commitment to the rule of law. The President is in the best position to make a determination on

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[2] In the particular context of Presidential decisions whether or not to comply with ICJ decisions, Congress has routinely allowed the President to respond and has not directly acted. See pp. 19-21, *infra*. At an absolute minimum then, this case involves a valid Presidential action in the context of Congressional "acquiescence."

those issues because the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries," and it is the President who is responsible for the conduct of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). The Executive Branch, not Congress, discharges the consular function on behalf of Americans abroad in hundreds of consulates and embassies around the globe, and the President has the primary responsibility in managing the multifarious considerations implicated by a critical bilateral relationship like that between the United States and Mexico.

Another advantage of allocating to the President the lead role in responding to an ICJ decision is his ability to respond expeditiously. The Executive Branch, unlike the legislative branch, is structurally designed to act with "dispatch." *The Federalist, No. 70*, at 472 (A. Hamilton) (J. Cooke ed. 1961). That structural difference is significant because a substantial delay in obtaining compliance with an ICJ decision may endanger the very foreign policy objectives that compliance is designed to achieve.

In ratifying the Optional Protocol and the U.N. Charter, the Senate would necessarily have been aware that the President is responsible for and best positioned to address the sensitive foreign policy issues implicated by an ICJ decision, and to do so expeditiously. Ratification of those treaties should therefore be understood as entrusting the President with the authority to determine whether and how best to implement an ICJ decision.

2. The President has independent authority to resolve disputes with foreign nations

a. The President's exercise of authority to implement an ICJ resolution also rests on the President's long established authority to resolve disputes with foreign nations, particularly

those involving international claims. That established authority forms an important backdrop for assessing the extent of the authority that the Optional Protocol and the U.N. Charter confer on the President.

The President has exercised authority to settle disputes with foreign nations involving international claims since at least 1799, and between 1817 and 1917, Presidents entered into 80 such agreements. *Dames & Moore*, 453 U.S. at 679 n.8. In the modern era, Presidents have continued to enter into executive claim settlement agreements. For example, between 1952 and 1980, the President entered into at least ten binding settlements with foreign nations. *Id.* at 680.

In a series of cases, the Court has upheld the President's authority to determine individual rights as part of settling disputes with foreign nations. *American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396 (2003); *Dames & Moore*, *supra*; *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1937). The President may exercise this dispute resolution authority without seeking the consent of the Senate or approval from Congress, *Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 682-683; *Pink*, 315 U.S. at 223, 229; *Belmont*, 301 U.S. at 330, and the exercise of such authority preempts conflicting state law. *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 310 U.S. at 327, 331.

b. In *Belmont*, the Court upheld the validity of an executive agreement that resulted from an exchange of diplomatic correspondence between the United States and the Soviet Union. 301 U.S. at 326. Under the agreement, the Soviet Union assigned to the United States its claims against American nationals, including certain claims against banks. *Ibid.* The lower courts refused to enforce the United States' assignment-based claim against a bank on the ground that the Soviet Union's nationalization policy was confiscatory and

therefore violated state public policy. *Id.* at 327. The Court reversed, holding that "no state policy can prevail against the international compact here involved." *Ibid.* The Court reasoned that "the external powers of the United States are to be exercised without regard to state law or policies," that "[t]he supremacy of a treaty in this respect has been recognized from the beginning," and that "all international compacts and agreements" are subject to "the same rule." *Id.* at 331. The Court also held that the agreement did not "require the advice and consent of the Senate." *Id.* at 330. In *Pink*, the Court reaffirmed that the executive agreement prevailed over conflicting state law, explaining "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *Id.* at 230-231.

In *Dames & Moore*, the Court upheld the validity of an executive order suspending claims by United States nationals against Iran filed in United States courts, including state law claims in state court. 453 U.S. at 686. The executive order implemented an executive agreement with Iran to "terminate" all legal proceedings in the United States courts involving claims against Iran so that they could be resolved in an Iran-United States Claims Tribunal. *Id.* at 665. The Court found that the President's suspension of claims was not authorized by statutes, *id.* at 675-677, but concluded that those statutes "invite[d]" the President's action because they gave the President broad authority in "closely related" areas. *Id* at 678 (citation and internal quotation marks omitted). The Court also relied on the President's "longstanding practice of settling * * * claims by executive agreement without the advice and consent of the Senate," *id.* at 679, reasoning that Congress had through acquiescence "implicitly approved" that practice. *Id.* at 680.

In *Garamendi*, the Court invalidated a state law that required insurers doing business in the State to disclose information about Nazi-era insurance policies. 539 U.S. at 401. The President had entered into agreements with foreign governments to encourage the establishment of voluntary compensation funds for persons who had claims for unpaid Nazi-era insurance. *Id.* at 421-422. The Court held that the state law conflicted with the policy reflected in the President's agreements and was therefore preempted. *Id.* at 416-417. The Court reasoned that its decisions in *Dames & Moore*, *Pink*, and *Belmont* had "recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification or approval by Congress," *id.* at 415, and that "valid executive agreements are fit to preempt state law, just as treaties are." *Id.* at 416. The Court noted that the agreements at issue did not expressly preempt state law, *id.* at 417, but it concluded that statements of Executive Branch officials made clear that the state law impermissibly interfered with the policy reflected in the agreements. *Id.* at 421-425.

c. The President's determination pursuant to the Optional Protocol and U.N. Charter is an exercise of this dispute-resolution power. The President's determination to accept and implement the ICJ's decision resolves the dispute between the United States and Mexico over the ability of 51 individuals to secure review and reconsideration of their convictions and sentences. In crucial respects, the President exercises a more modest power in implementing the *Avena* decision than in entering into claims settlement agreements in other contexts. First, the range of possible international disputes subject to executive settlement is potentially quite extensive, while responsibility for complying with particular ICJ decisions is constrained by the particular decision and the relatively nar-

row scope of disputes subject to ICJ jurisdiction by virtue of a Senate-ratified treaty.

Second, in each of the settlement cases, the President decided on the terms of the settlement without explicit sanction from the Senate or Congress. In contrast, here the President is acting pursuant to the Optional Protocol and the U.N. Charter, and those treaties, in combination, expressly provide for resolution of these types of disputes by a binding decision of the ICJ. Once the ICJ issues such a Senate-authorized resolution of a dispute, only the question of implementation remains. In light of the President's established authority to resolve disputes with a foreign government over the claims of individuals without Senate or congressional approval, the Optional Protocol and the U.N. Charter should be understood to recognize, and to provide the President with, the more modest implementation authority exercised here.

3. The President has statutory responsibilities that are closely related to the authority he exercised here

In evaluating the scope of the President's authority under the Optional Protocol and the U.N. Charter, it is also appropriate to examine the President's statutory authority in closely related areas. Cf. *Dames & Moore*, 453 U.S. at 678 (statutes that give the President broad authority invite Presidential action in closely related areas). Of particular importance, Congress has expressly authorized the President to direct all functions connected with the United States' participation in the United Nations. See 22 U.S.C. 287, 287a. Pursuant to that authority, the President represents the United States in cases before the ICJ. The President also has responsibility to represent the United States before the Security Council. If the United States decided not to comply with an ICJ decision, the other party to the decision could seek to enforce the decision in the Security Council. See U.N. Char-

ter, Art. 94(2), 59 Stat. 1051. If the United States sought relief from the ICJ, there would be no question that the President would be responsible for obtaining a favorable decision and securing its enforcement. The converse is also true. A logical and coherent scheme is established when the same person who represents the United States before the ICJ and before the Security Council in the event of an enforcement action also has authority to implement the Nation's treaty obligations if he so determines.

It is also significant that Congress has given the President broad authority to secure the release of citizens detained abroad. 22 U.S.C. 1732. While that statute does not authorize the President to implement an ICJ decision relating to consular access, it demonstrates Congress's recognition that the President is in the best position to determine what actions to take to protect Americans citizens detained abroad. Cf. *Dames & Moore*, 453 U.S. at 678.

4. The President has an established role in litigation implicating foreign policy concerns

a. The President's claim of authority under the Optional Protocol and the U.N. Charter to implement an ICJ decision also draws strength from contexts in which the Executive Branch has exercised authority to determine whether an international rule of law should be applied in domestic courts. For example, before enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, the Executive Branch determined whether a foreign sovereign should receive immunity from suit, and courts were required to give effect to those determinations. See *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 486-487 (1983); *Mexico* v. *Hoffman*, 324 U.S. 30, 33-36 (1945); *Ex parte Peru*, 318 U.S. 578, 586-590 (1943).

In *Ex parte Peru*, a libel action was filed against a steamship owned by Peru. The Under Secretary of State wrote a letter to the Attorney General asking him to communicate to the court that the State Department recognized and allowed Peru's claim of immunity, and the Attorney General filed that letter with the court. 318 U.S. at 581. This Court held that the State Department's letter required dismissal of the suit, explaining that "[u]pon recognition and allowance of the claim [of immuniity] by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations." *Id.* at 588. After the State Department adopted a more restrictive view of sovereign immunity that was formalized in a letter from the Acting Legal Adviser Jack B. Tate to the Acting Attorney General, *Verlinden*, 461 U.S. at 487 & n.9, "courts [still] abided by 'suggestions of immunity' from the State Department." *Id.* at 487.[3]

The Executive Branch's authoritative role in litigation implicating foreign affairs extends beyond determinations of foreign sovereign immunity. The Executive Branch also authoritatively determines which governments are entitled to sue in our courts, *Pfizer, Inc.* v. *India*, 434 U.S. 308, 319-320 (1978), and whether a treaty remains in force. See *Terlinden* v. *Ames*, 184 U.S. 270, 285 (1902). The pivotal role of the Executive Branch in supplying the rule of decision in litigation implicating sensitive foreign policy considerations bolsters the conclusion that the Optional Protocol and the U.N. Charter authorize the President to implement the United States' obligation to comply with *Avena* by having state courts give effect to that decision.

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[3] That practice continued until enactment of the FSIA established a statutory standard for dismissals based on sovereign immunity. *Verlinden*, 461 U.S. at 487.

b. The President's authority to file suit to enforce a treaty without express statutory authorization further demonstrates the President's unique role in litigation implicating foreign policy concerns. See *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925). In *Sanitary District*, the United States brought suit against a municipality that was withdrawing water from Lake Michigan in violation of a treaty with Great Britain that prohibited the withdrawal without the agreement of the United States and Canada. The Court held that the Executive Branch had standing "to carry out treaty obligations to a foreign power," and that "no statute [was] necessary to authorize the suit." *Ibid.*

Under the analysis in *Sanitary District*, the President would have authority to sue a State to enforce the United States' treaty obligation to give effect to the *Avena* decision. But the President should not be required to engage in such coercive, disruptive, and inefficient litigation in order to ensure compliance with that treaty obligation. Instead, the Optional Protocol and the U.N. Charter authorize the President to insist that state courts give effect to *Avena* without the necessity of the Executive Branch filing its own case in federal court.

5. The President has assumed responsibility for responding to previous ICJ decisions

Practice also supports the President's claim of authority under the Optional Protocol and the U.N. Charter to respond authoritatively to an ICJ decision. During the time that the United States has submitted disputes to the ICJ for resolution, the ICJ has rendered five decisions that have called for implementation by the United States, including *Avena*.[1] In

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[1] *See Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176 (Aug. 27); *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986

each case, the Executive Branch made the decision on how to respond to the ICJ decision. And in each case, Congress acquiesced in that response. Cf. *Dames & Moore*, 453 U.S. at 678 (finding relevant a "history of congressional acquiescence" in Presidential authority).

The cases illustrate the range of issues that have come before the ICJ and the way in which the Executive Branch has responded. For example, in *Nicaragua* v. *United States*, the ICJ decided that the United States owed reparations to Nicaragua for its military activities in that country. 1986 I.C.J. 149. The President determined that the United States would *not* comply with the ruling, and when Nicaragua attempted to raise the issue in the Security Council, the President's representative vetoed the resolution.

In *Gulf of Maine*, United States and Canada agreed in a treaty and two related agreements to submit a boundary dispute to the ICJ for a binding resolution. 1984 I.C.J. 246. After the ICJ determined the precise boundary lines, *id.* at 345, para. 243, the Secretary of State adopted the new coordinates for mapping purposes and instructed the National Oceanic and Atmospheric Administration (NOAA) to use the ICJ line as the limit of the United States' Exclusive Economic Zone. The NOAA then issued a final rule presenting the new boundary line in accordance with the ICJ's determination. 49 Fed. Reg. at 43,676.

In *LaGrand*, the ICJ issued provisional measures to prevent Walter LaGrand's execution. 2001 I.C.J. 479, para. 32. The Executive Branch construed the provisional measures as not binding, but it transmitted the ICJ's order to the Governor of Arizona. 2001 I.C.J. 506-507, para. 111. The ICJ ultimately determined that the United States had violated its

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I.C.J. 14 (June 27); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

obligation to give consular notification and that the United States should, by a means of its own choosing, allow review and reconsideration of convictions and sentences of German nationals denied consular notification in the future. 2001 I.C.J. 515-516, para. 128(3)-(4), (7). In response to the decision, the Executive Branch determined that review and reconsideration should occur through the clemency process when avenues for judicial review were exhausted under domestic law. The State Department therefore sent letters to Governors, parole boards, and clemency boards encouraging them to consider the violations of the right to consular notification in cases involving the death penalty.

Thus, the Executive Branch, and not the Congress, has consistently assumed responsibility for responding to an ICJ decision whether the response took the form of compliance or non-compliance. And the Congress has taken no action to suggest disagreement with that course. *Garamendi*, 539 U.S. at 429. That consistent practice supports the conclusion that the President validly took responsibility for responding to the ICJ's decision in this case without the need for a legislative enactment.

C. The Reasons Offered By The Court Below For Invalidating The President's Determination Are Unpersuasive

No majority of the court below joined a single opinion invalidating the President's determination. The various opinions offer four different reasons, but none is persuasive.

1. Relying on *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669 (2006), the plurality concluded that the President "has exceeded his constitutional authority by intruding into the independent powers of the judiciary" to determine "what law to apply" and "how to interpret the applicable law." Pet. App. 30a. The President's determination, however, does not conflict with *Sanchez-Llamas* or intrude on the judiciary.

a. In *Sanchez-Llamas*, the Court held that the ICJ in *Avena* had erroneously interpreted the Vienna Convention to displace ordinary procedural default rules, and it therefore failed to defer to the ICJ's interpretation. 126 S. Ct. at 2685-2687. The President likewise has determined that the ICJ's interpretation of the Vienna Convention is flawed. But neither the President's view nor the Court's holding in *Sanchez-Llamas* relieves the United States of its treaty-based obligation under the *Avena* decision to afford 51 Mexican nationals review and reconsideration of their convictions and sentences. Under the Optional Protocol and the U.N. Charter, the *Avena* decision (or judgment as it would be called in American practice) continues to impose a treaty-based obligation on the United States "to comply with the decision" without regard to the merits of the treaty interpretation that led to the decision. Article 59 of the ICJ statute, 59 Stat. 1062; Art. 94(1), 59 Stat. 1051. The President's determination fulfills that obligation to comply with the ICJ's decision; it hardly reflects agreement with the ICJ treaty interpretation, which has been rejected by the President and the Court in *Sanchez-Llamas*.[3]

Nor is enforcement of the *Avena* decision precluded by United States' disagreement with the ICJ's interpretation of the Vienna Convention. It is inherent in international adjudication that an international tribunal may reject one country's legal position in favor of another's—and the United States explicitly accepted this possibility when it ratified the Optional Protocol. The law of judgments also contemplates that a court will generally enforce a foreign judgment without regard to its legal merits. *Hilton* v. *Guyot*, 159 U.S. 113, 202

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[3] Indeed, the President advocated the interpretation of the Vienna Convention that the Court adopted in *Sanchez-Llamas*. 126 S. Ct. at 2685. And the President withdrew from the Optional Protocol to ensure that the ICJ's erroneous interpretation could not result in future ICJ decisions that would bind the United States. See pp. 1-2, *supra*.

(1895). The President's determination and the resulting judicial role in giving effect to the President's determination is consistent with that general rule.

b. The President's determination also does not impermissibly intrude on the judicial role. As in analogous contexts, the determination supplies the substantive rule of law for the court to apply; it does not divest the court of its authority to interpret that rule and apply it to the particular facts.

The Court's cases establish that the President does not intrude on the judicial role when he supplies a rule of law for the court to apply. In all of the executive agreement cases (*Belmont*, *Pink*, *Dames & Moore*, and *Garamendi*), as well as the sovereign immunity cases (*e.g. Ex parte Peru*), the President supplied a rule of law for the court to apply. In *Dames & Moore*, the Court made clear that such action does not intrude on a court's role. In that case, the Court squarely rejected the argument that the President's order suspending claims against Iran intruded on the court's Article III power, explaining that the President "had simply effected a change in the substantive law governing the lawsuit." 453 U.S. at 684-685. That reasoning is equally applicable here.

2. The plurality also concluded that the President's action is invalid because it takes the form of unilateral action, rather than an agreement with Mexico. Pet. App. 43a. That rationale ignores the crucial fact that the United States and Mexico had already agreed through the Optional Protocol and the U.N. Charter to resolve their dispute by submitting it to the ICJ for a binding decision. Once the ICJ issued its decision, a further agreement would be superfluous. The President simply had to decide whether and how to comply with the United States' resulting treaty obligations.

The plurality's rationale also needlessly hamstrings the President's authority to fulfill the United States' treaty obli-

gations. Securing yet another agreement may be time-consuming when the President has determined that swift action is required. A government may be unwilling to enter a successive agreement, yet may nonetheless be willing to acquiesce in the President's implementation of a preexisting one. And the precondition imposed by the plurality would effectively give a foreign government a veto power over the President's exercise of authority under treaties of the United States.

3. In a separate opinion, Presiding Judge Keller concluded that the President's determination violated principles of federalism because she viewed the national interest served by the President's determination as weak, and the State's interest in failing to comply with the President's determination as strong. Pet. App. 69a-71a. But where, as here, the President acts pursuant to his authority under valid treaties of the United States, principles of federalism do not stand as an obstacle. To the contrary, federal law is supreme, and state law must give way. See p. 13, *supra*.

In any event, the validity of the President's efforts' to comply with a treaty obligation cannot possibly turn on a state court's application of an ill-defined balancing test. The responsibility for balancing the costs of compliance with a treaty obligation, including the costs in terms of federal-state relations, belongs to the President. Here, the President determined that promoting the international rule of law and protecting Americans abroad require implementation of *Avena*, and those interests are compelling.

At the same time, the Presidential determination intrudes no more on state authority than is necessary to fulfill the United States' treaty obligation to comply with *Avena*. As *Avena* requires, the President's determination mandates review and reconsideration without regard to procedural default principles, but it does not divest state courts of authority to

resolve the underlying claims. Nor does the President's determination require state courts to reach a particular outcome. Instead, it requires only that the States that violated their Vienna Convention obligation to notify 51 Mexican nationals of their right to consular access determine whether their violations prejudiced the defense. The President's determination thus respects the States' traditional role in deciding the merits of the claims of criminal defendants who seek to overturn their convictions or sentences, while ensuring that the United States discharges its treaty-based obligation under the ICJ's decision.

The Court's decisions have recognized the President's authority to displace state causes of action completely in order to settle international disputes. See *Garamendi*, 539 U.S. at 427. The result here is far less intrusive. Moreover, to the extent that there is an intrusion on state interests, it is traceable to the Senate-ratified Vienna Convention itself, and to the State's violation of the Convention. That Convention imposes on the United States an obligation relating to consular access that by necessity requires the cooperation of state and local officials to ensure compliance. And, by virtue of the Supremacy Clause, Art. VI, Cl. 2, the requirements of the treaty supersede state and local laws. The additional intrusion on States that occurs when an international tribunal imposes an obligation on the United States through a decision made binding by the Optional Protocol and the U.N. Charter is no greater than the intrusion inherent in the Convention (which is not challenged on federalism grounds here) and pales in comparison with the federal interest in treaty compliance.

4. Judge Cochran concluded that because the President's determination took the form of a memorandum to the Attorney General, rather than a Presidential Proclamation or an Executive Order, it could not create binding federal law. Pet. App. 76a-79a. Nothing in the United States Constitution,

however, requires a Presidential directive to take any particular form for it to have binding effect. The terms of the President's determination make clear that it was intended to have the legal effect of discharging the United States' obligation by having state courts give effect to the *Avena* decision in the case of 51 identified individuals. *Id.* at 187a. Nothing more was required to make it binding law.

Indeed, in *Ex parte Peru*, the Court gave effect to an immunity determination expressed in a State Department letter to the Attorney General. 318 U.S. at 581, 588. And in *Belmont* and *Pink*, the Court accepted as binding law an executive agreement that resulted from an exchange of letters between a Russian Government official and the President. *Pink*, 315 U.S. at 211-212; *Belmont*, 324 U.S. at 326. The binding nature of a President's determination does not depend on its form.

D. The State's Additional Arguments Are Without Merit

The State challenges the validity of the President's determination on two additional grounds. First, the State contends (Br. in Opp. 19) that because the obligation to comply with *Avena* is not self-executing, the President lacks power to implement the decision. That contention lacks merit. While the United States' obligation to comply with *Avena* is not self-executing, that simply underscores that the President has an important intervening role in deciding whether or not the United States will comply with a decision such as *Avena*. If the decision were privately enforceable, it would essentially eliminate the President's role in deciding whether to comply.

The State cites two cases that describe a treaty that is not self-executing as one that requires action by the legislative branch to make it judicially enforceable. Br. in Opp. 19-20 n.10 (citing *Whitney* v. *Robinson*, 124 U.S. 190, 194 (1883), and *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829)). But

neither of those cases addressed treaties in which the United States agreed to submit a dispute to an international body for resolution and further agreed that the decision of that international body would be binding. Nor did either of those cases involve a claim by the President that the applicable treaties authorized him to fulfill the United States' treaty obligation by having courts give effect to that resolution. Moreover, even with the President's determination, the treaty obligation to comply with the *Avena* decision remains non-self executing. It is ultimately the President's determination, not the treaty, that provides state courts with the rule of decision.

The State similarly errs in contending (Br. in Opp. 22-23) that the provision in the U.N. Charter that permits a party to the agreement to seek enforcement of an ICJ decision in the Security Council, see Art. 94(2), 59 Stat. 1051, shows that the obligation to comply with an ICJ decision may be enforced only diplomatically or politically, and not through domestic courts. That U.N. Charter provision simply recognizes that the political branches of a Nation may choose *not to comply* with an ICJ decision, and provides that, in that event, recourse to the Security Council is the sole remedy. It does not address the situation where, as here, the President decides *to comply* with an ICJ decision and exercises authority under treaties to make the decision judicially enforceable.

II. THE *AVENA* DECISION IS NOT PRIVATELY ENFORCEABLE ABSENT THE PRESIDENT'S DETERMINATION

Petitioner contends (Pet. 24-26) that the *Avena* decision is privately enforceable of its own force because the Optional Protocol and the U.N. Charter obligate the United States to comply with the decision. That contention lacks merit.[7]

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[7] If the Court decides that state courts must provide review and reconsideration, *by virtue of the President's determination*, there is no need for the Court

For the reasons previously discussed, the Optional Protocol and the U.N. Charter give the President the authority to decide whether the United States will comply with an ICJ decision, and if so, what measures should be taken to comply. Allowing private enforcement, without the President's authorization, would undermine the President's ability to make those determinations and inappropriately transfer them to the courts. Cf. *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005). In the context of this case, it would eliminate noncompliance—which is a possibility contemplated by the U.N. Charter—as an option. Thus, far from being supported by the Optional Protocol and the U.N. Charter, private enforcement of an ICJ decision, without Presidential authorization, conflicts with those treaties.

Moreover, while the Optional Protocol and the U.N. Charter together create an international obligation to comply with an ICJ decision, the text of those treaties forecloses the argument that an ICJ decision is privately enforceable on its own force. Cf. *Sanchez-Llamas*, 126 S. Ct. at 2679. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the [Vienna Convention] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. at 326, 596 U.N.T.S. at 488. That provision gives a nation a right to invoke the jurisdiction of the ICJ; it does not give a private individual a right to enforce an ICJ decision in a United States court.

Article 94 of the U.N. Charter provides that "[e]ach member of the United Nations *undertakes to comply* with the deci-

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to address the question whether the *Avena* decision would be privately enforceable in the absence of that determination.

sion of the International Court of Justice in any case to which it is a party." 59 Stat. 1051 (emphasis added). Those words "do not by their terms confer rights on individual citizens; they call upon governments to take certain action." *Committee of United States Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (citation and quotation marks omitted).

The text of the ICJ statute, which is incorporated into the U.N. Charter, speaks to the issue even more directly. It makes clear that an ICJ decision is binding only "between the parties" to the case, Art. 59, 59 Stat. 1062, and that only nations "can be parties." Art. 34, 59 Stat. 1059. Accordingly, in the absence of the President's determination, a private party cannot enforce an ICJ decision in court.

Nor does the ICJ decision purport to be privately enforceable of its own force. The ICJ determined that the United States' obligation was "to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the [affected Mexican nationals.]" Pet. App. 185a (emphasis added). Permitting private judicial enforcement in the absence of action from the President or the Congress would deprive the political branches of the very choice of means that the ICJ intended for them to have. Thus, while petitioner is entitled to review and reconsideration *by virtue of the President's determination*, such review and reconsideration would not be available to petitioner in the absence of the President's determination.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted.

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JUNE 2007

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No. 06-984

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the *Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.)* (the "*Avena* Judgment"), I.C.J. No. 128 (judgment of Mar. 31, 2004), the International Court of Justice reviewed the convictions and death sentences of 51 named Mexican nationals, including Petitioner. It held that those individuals were entitled to receive review and reconsideration of their convictions and sentences through the post-conviction judicial process in the United States. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the judgment by giving those 51 individuals review and reconsideration of their convictions in the state courts. However, the Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the *Avena* Judgment. In light of that decision, Amicus will address the following question:

Are state courts bound by the Constitution to honor the international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* Judgment in the cases that the judgment addressed?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, amicus curiae American Bar Association ("ABA" or "Amicus") respectfully submits this brief in support of the position that the United States's obligations under the Vienna Convention bind states to give effect to the *Avena* Judgment in the cases that the judgment addressed.

STATEMENT OF INTEREST

The ABA is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 413,000 attorneys spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

Among the ABA's goals are "promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

condition" and "advanc[ing] the rule of law in the world." *See* http://www.abanet.org/about/goals.html. In 1998, the ABA House of Delegates adopted a resolution specifically recognizing the importance to the rule of law of State compliance with obligations undertaken through the Vienna Convention.[3]

While the ABA takes no position on the death penalty as a general matter, it is concerned about the effective representation of criminal defendants in capital cases. The ABA's House of Delegates has adopted several specific policies in this regard, including *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Guidelines*").[4] The Guidelines, originally adopted in 1989, amplify previously adopted Association positions on effective assistance of counsel in capital cases and "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." The ABA subsequently adopted a revised and detailed version

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[3] ABA House of Delegates Resolution 125, Policy on Consular Assistance (1998).

[4] ABA House of Delegates Resolution 107, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989). *See also ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.2 cmt. at 11 (3d ed. 1993) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 13 (1990); *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 51.2 cmt. at 12 (incorporating ABA Guidelines by reference); ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [*ABA Guidelines*].").

of these Guidelines in 2003 with specific guidance for foreign nationals subject to the Vienna Convention's protections.[5]

The Guidelines set forth specific guidance for attorneys representing foreign nationals. *See* Guideline 10.6 – Additional Obligations of Counsel Representing a Foreign National, adopted by the House of Delegates in February 2003. That Guideline instructs that at every stage of a case, counsel "should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." *Id.* Unless predecessor counsel has already done so, an attorney representing a foreign national is instructed to "immediately advise the client of his or her right to communicate with the relevant consular office," to "obtain the consent of the client to contact the consular office," and then to immediately contact the consular office to inform it of the client's detention or arrest. *Id.*

SUMMARY OF ARGUMENT

International treaties constitute federal law, and as such are binding on the United States as a whole and preempt any conflicting state laws through the Constitution's Supremacy Clause. The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention") is a treaty, duly ratified by the United States Senate. Article 36 of the Vienna Convention guarantees to the citizens of all signatory nations effective notice and access to consular services if they are arrested in another signatory nation. The companion Optional Protocol, to which the United States was also a signatory until February 28, 2005, provides for compulsory jurisdiction by the International Court of Justice ("ICJ") over all signatory nations to resolve disputes concerning the interpretation of the Convention's

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[5] *See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003).

provisions, including Article 36. *See* Optional Protocol, 21 U.S.T. 325, art. I.

The United States's withdrawal from the Optional Protocol in 2005 does not alter the United States's obligation to comply with judgments in cases to which the United States was a party and which were issued by the ICJ before its withdrawal.[6] Both the rule of law, and the United States's commitment as a signatory to the United Nations Charter Article 94(1), require that all courts within the United States honor and enforce such judgments. *See* 59 Stat. 1031, T.S. 993 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.").

In the instant case, the State of Texas has violated Supremacy Clause principles by declining, in a state post-conviction proceeding, to enforce an ICJ decision to which the United States is bound. The application of Article 36 of the Vienna Convention to Petitioner, Mr. Medellin, was formally decided in a 2004 ICJ case filed by Mexico against the United States, on behalf of Mr. Medellin and certain other Mexican citizens.[7] The ICJ ruled in that case that Texas's failure to advise Petitioner of his right to consular services violated both Mexico's and Petitioner's rights under the Convention. *See Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31, 2004) ("*Avena* Judgment") ¶¶ 106, 153(4)-(7). Although the ICJ denied Mexico's request for annulment of the convictions

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[6] The ABA has not taken any position on the United States' withdrawal from the Optional Protocol and does not intend to take any position on this decision through submission of this brief.

[7] Mexico initially filed on behalf of 54 of its nationals, which was subsequently reduced to 52 at the time of decision. The ICJ concluded that Mexico failed to prove a violation with respect to one of the 52 remaining Mexican nationals. *See Avena* Judgment ¶ 74.

and sentences, *id.* ¶ 123, the ICJ held that United States courts must provide review and reconsideration of the convictions and sentences involving the violations it had found. *Id.* ¶¶ 121, 128-34. The ICJ also specifically held that applying procedural default doctrines to bar consideration of the Mexican nationals' Vienna Convention claims would itself violate the Vienna Convention. *Id.* ¶¶ 112-13.[8]

Notwithstanding the *Avena* Judgment, the Texas Court of Criminal Appeals held in the proceeding below that Mr. Medellin's claim was foreclosed by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). *See Ex parte Medellín*, __S.W.3d __, 2006 WL 3302639, at *9 (Nov. 15, 2006). In so holding, the Texas court did not consider whether the *Avena* Judgment would be binding in the cases of the 51 nationals, including Petitioner, whose cases the ICJ specifically adjudicated. Thus, unlike *Sanchez-Llamas*, this case implicates the United States's legal duty to honor the judgments entered by the ICJ during the time the Optional Protocol was in effect. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Medellin v. Texas*,

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[8] The *Avena* Judgment developed and strengthened the ICJ's earlier judgment in the *LaGrand Case*, a case brought by Germany against the United States also alleging violations of the Vienna Convention. *LaGrand Case (Germany v. U.S.)*, 2001 I.C.J. 466 (June 27) ("*LaGrand*"). Unlike in *Avena*, by the time the ICJ ruled in *LaGrand*, both of the German nationals in question had been executed. The ICJ held in *LaGrand* that: (1) Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; (2) applying procedural default rules to prevent detained individuals from challenging their convictions and sentences on the ground that their rights under Article 36 of the Vienna Convention had been violated, itself violated the Vienna Convention; and (3) if the United States failed to comply with Article 36 in future cases involving German nationals subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* ¶¶ 77, 90-91, 125.

No. 06-984 (Mar. 2007) ("[*Sanchez-Llamas*] involved the question whether an ICJ *interpretation* should be given effect in this country's courts. Because it did not present the question whether an ICJ *decision* should be given effect, it did not resolve that question.").

The *Avena* Judgment was rendered prior to February 28, 2005, while the United States was a party to the Optional Protocol and thus legally bound to abide by the results of the Optional Protocol's dispute resolution process. Consistent with that federal obligation, the *Avena* Judgment's conclusions—namely, that the Vienna Convention's consular notice provision was violated, and that this violation is not subject to domestic procedural default rules—must be given full effect in our domestic legal system in cases involving a party subject to that decision. This obligation is not affected by an assertion that a United States court might have resolved the issues in that case differently in the first instance. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 203 (1895) ("[T]he merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact.").

Structural constitutional principles beyond the Supremacy Clause itself also require that United States courts give effect to the *Avena* Judgment. The need for uniform conduct among the states in matters of international relations is essential to effecting the treaty powers enjoyed by the President and the Senate, and must take precedence over the policy interests underlying procedural rules—interests that are themselves subject to balancing. The interests of comity would not be undermined by enforcing federal treaty obligations in state post-conviction proceedings. Moreover, the burden on state courts to resolve the claims of the named individuals who had their rights determined in the *Avena* Judgment would be minimal given the relatively small number of individuals who are the subject of that decision.

None of the potential problems with reconciling the ruling of the ICJ in *Avena* with the requirements of federal habeas that this Court noted in *Medellin v. Dretke*, 544 U.S. 660 (2005), exist here. The structural source of those potential problems was the parity between treaties and federal statutes—in particular, between the Vienna Convention and the Antiterrorism and Effective Death Penalty Act. Here, however, it is a conflict between a federal treaty obligation and a state procedural rule that must be reconciled, and it is clear that, under the Supremacy Clause, the federal treaty obligations must prevail.

Accordingly, the ABA urges this Court to hold, as a matter of law, that the *Avena* Judgment must be given effect as binding upon the courts of Texas pursuant to federal law.

ARGUMENT

I. The *Avena* Judgment is binding as to the rights of the 51 named defendants and Mexico.

By ratifying the Vienna Convention, the United States committed itself to the consular notification and access provisions of Article 36. That commitment is binding federal law which, under the Supremacy Clause of the United States Constitution, takes precedence over any contrary state law. U.S. CONST. art. VI, cl. 2 ("all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and judges in every State shall be bound thereby."); *United States v. Belmont*, 301 U.S. 324, 331 (1937).[9]

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[9] The United States Department of State, realizing the importance of ensuring reciprocal compliance by other nations, recently confirmed the Executive Branch's commitment to securing the rights created by Article 36. *See* United States Department of State Announcement: All Consular Notification Requirements (Cont'd)

The United States also committed, by ratifying the accompanying Optional Protocol, to submit Vienna Convention disputes to ICJ jurisdiction and to comply with the ICJ's judgment in those cases. *See* Optional Protocol, art. I (providing that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice."). That obligation is reinforced by the U.N. Charter, which requires U.N. Members to abide by any decision duly entered by the ICJ to which they are parties. U.N. Charter Article 94(1), 59 Stat. 1031, T.S. 993 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."). Thus, throughout the period when the United States was a party to the Optional Protocol, disputes over interpretation of the Vienna Convention were subject to the ICJ's compulsory jurisdiction, and enforceable pursuant to federal law in cases where the United States was a party. While decisions of the ICJ have a more narrow precedential effect than those of domestic courts, an ICJ judgment is binding with regard to the specific parties that are the subject of the judgment. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (ICJ Judgments' binding force applies to "the parties and in respect of that particular case") (quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945)).

Because Mr. Medellin is one of the Mexican nationals whose rights were determined by the *Avena* Judgment, that judgment binds courts in the United States adjudicating the lawfulness of Mr. Medellin's detention. That legal obligation is not affected by the later decision of the United States to

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(Cont'd)

Remain in Effect, *available at* http://travel.state.gov/news/news_2155.html ("The U.S. is fully committed to compliance with our international legal obligations under the [Vienna Convention], and actively works to improve compliance nationally.").

withdraw from the Optional Protocol, which has prospective effect only. Thus, any state procedural bar or other state law rule that would prevent consideration of Mr. Medellin's consular notification claims would necessarily conflict with the federal law unless such an exception is permitted by the Vienna Convention itself. No such exception exists here.

On the contrary, the ICJ specifically held that the Vienna Convention forbids application of domestic procedural default rules to preclude review or relief for Vienna Convention violations. *Avena* Judgment ¶ 113 (holding application of procedural default rule would prevent "'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violate[s] paragraph 2 of Article 36.").

The *Avena* Judgment, as applied to Mr. Medellin, thus prohibits Texas's procedural rules from acting as a bar to review of Mr. Medellin's claim that the violation of the Vienna Convention rendered his conviction invalid. *See id.* ¶ 139 (stressing the importance to the "review and reconsideration process [of] the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention"). Indeed, to allow Texas to deprive Mr. Medellin of his right to present that claim would violate supremacy principles and effectively permit a state court to defy a federally recognized judgment.[10]

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[10] Roughly 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ. *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58–81 (Lori F. Damrosch ed., 1987). The United States has been involved in more ICJ cases than any other state. *See* ICJ, Contentious Cases Ordered by Country Involved, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&p3=1. Texas's failure to carry out the *Avena*

(Cont'd)

The supremacy of treaty law over state law requires that treaty obligations be given their natural effect and not be narrowly construed in deference to states. *See Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) ("[T]he meaning of treaty provisions . . . is not restricted by any necessity of avoiding possible conflict with state legislation. . . ."). As such, this Court has expressly disclaimed attempts to adopt a canon of avoidance when interpreting treaties in potential conflict with state law, because doing so would permit individual states effectively to shape and modify interpretation of binding federal treaty obligations. *Id.*

Portending this Court's long history of acting to prevent or remedy treaty violations by the states, in an early case in American history, *Ware v. Hylton*, the Court struck down a state statute rather than a U.S. treaty. 3 U.S. (3 Dall.) 199, 237 (1796) ("If a law of a State, contrary to a treaty, is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole."); *see also Neilsen v. Johnson*, 279 U.S. 47 (1929); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Martin v. Hunter's Lessee*, 14 U.S. (Wheat.) 304 (1816). Likewise, states cannot withdraw from treaties, nor are they free to abrogate United States's obligations. Indeed, it was the failure of states to observe the treaties made by the Continental Congress that was one of the practices that lead to the calling of the Constitutional Convention. *See* THOMAS ANDREW BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE, ch. V (8th ed. 1968); *see also* The Federalist No. 15 at 106 (Hamilton) (Benjamin Fletcher Wright ed., 1961); No. 22 at 144–55 (Hamilton); No. 42 at 265 (Madison).

(Cont'd)

Judgment with respect to the 51 named Mexican nationals could prejudice the ability of the United States to hold other states to their dispute settlement obligations.

The United States Government has determined that, in light of the nation's foreign policy interests, "there is a pressing need for expeditious compliance with [the *Avena*] decision." Brief for the United States as Amicus Curiae Supporting Respondent at 42, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). The President has characterized the *Avena* Judgment as an "international obligation" to be discharged "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in the decision." President George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). Accordingly, the decision of the Texas courts to disregard the binding nature of the *Avena* Judgment, and to interpose domestic procedural rules inconsistent with that judgment, is a violation of the Supremacy Clause and an improper intrusion on the federal government's exclusive treaty-making and implementation authority. *See United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested with the national government exclusively.").

II. The goal of the procedural default doctrine is to reduce the burdens that habeas proceedings place on state and federal courts is not applicable in the context of the federal government's plenary power over foreign relations.

A. The federal government's exclusive power regarding foreign relations requires that United States courts consistently enforce federal treaties regardless of contrary state procedural rules.

In matters of international relations, federal interests are both paramount and exclusive of state interests. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) ("concern for uniformity in this country's dealings with foreign nations ... animated the Constitution's allocation

of the foreign relations power to the National Government") (internal quotation marks omitted). In contrast, the procedural default doctrine is a jurisprudential rule crafted to protect the integrity of trial court proceedings.[11] A principal goal of the doctrine is to reduce the burdens habeas cases place on state and federal courts.[12] Because of the need for the United States to assure treaty partners that its treaty obligations will be uniformly enforced, conflicting procedural default rules must yield to this paramount federal interest.

The Constitution entrusts the federal government with "full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). As this Court has emphasized, "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.*; *see also Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933) ("In international

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[11] *See Dretke v. Haley*, 541 U.S. 386, 394 (2004) (referring to the exceptions to the procedural default doctrine as "judge-made rules"); Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 HOFSTRA L. REV. 1005, 1014 (1990) ("[R]espect for state procedural default rules is a judge-made doctrine, not directly drawn from any express statutory provision.").

[12] *See Murray v. Carrier*, 477 U.S. 478, 487-88 (1986) (refining the procedural default doctrine with the explicit goal of minimizing the burden on federal habeas courts). Federal-state comity also motivated the federal procedural default doctrine. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *Reed v. Ross*, 468 U.S. 1, 11 (1984) (explaining that considerations of comity and concerns for the orderly administration of criminal justice motivate the procedural default doctrine); *Coleman v. Thompson*, 501 U.S. 722, 730-32 (1991) (explaining that "concerns of comity and federalism" underlie procedural default rules).

relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); The Federalist No. 80, at 500 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("[T]he peace of the *whole* ought not to be left at the disposal of a *part*").

It is precisely because of the importance of ensuring that the entire country speak with one voice in international relations and that the United States be able to fulfill its international obligations, that the Constitution explicitly makes treaties "the supreme Law of the Land," overriding "any Thing in the Constitution or Laws of any State to the Contrary."[13] U.S. CONST. art. VI, cl. 2. "It is the declared duty" of both state and federal judges, under the Supremacy Clause, "to determine any Constitution, or laws of any State, contrary to [a] treaty ... made under the authority of the United States, null and void." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796); *see also Hauenstein v. Lynham*, 100 U.S. 483, 489 (1879) ("It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State.").

When a state arrests or prosecutes a citizen of a country that is a signatory to the Vienna Convention and fails to comply with the Convention's requirements, that failure violates not only the defendant's rights, but also the rights of the defendant's home country. *See, e.g., LaGrand* ¶ 74 ("[W]hen the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide

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[13] The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and the Senate unanimously ratified both instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). Accordingly, the Vienna Convention has the force of a treaty under the Constitution.

the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36"); *Avena* Judgment ¶ 102 (describing the United States as precluding Mexico "from exercising its right" under one provision of the Convention). Those rights include the rights "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36 ¶ 1(c).

Permitting Texas to preempt enforcement of the United States's commitment to implement the *Avena* Judgment would allow an individual state—through use of its own procedural bar—to impair the exclusive federal power to conduct relations with foreign sovereigns. When this is permitted, it is the federal government, not the State, that must contend with the resulting tension which, as this very case demonstrates, can substantially undermine the often-delicate relations between nations.

The impact on international relations distinguishes cases involving the *Avena* Judgment from other federal rights in which a state's interest in its procedural default rules is entitled to deference. Generally, if an American defendant violates a state procedural rule in attempting to assert an individual federal right, only that individual's rights are affected. In such situations, this Court has determined that broader policy concerns dictate that, absent cause and prejudice, the individual may forfeit that federal right. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977).

This balancing of interests is not applicable, however, when the right at issue belongs not just to the defendant, but also to his home country, through federally established treaty obligations. It would violate the federal government's exclusive power to conduct international relations to apply a conflicting balancing test that permits, and would effectively impose on another sovereign nation, obligations that are contrary to its treaty rights. Accordingly, this Court should give effect to the *Avena* Judgment's holding that, as to the 51 named individuals, Mexico's right to adjudication of certain issues may not be affected by domestic procedural rules.

B. Giving effect to the *Avena* Judgment would not create a significant burden for state or federal courts.

Giving effect to the *Avena* Judgment would not open the floodgates to state or federal habeas claimants. *Avena* Judgment claims would be limited to those individuals affected by the judgment and such claims would be litigated first in state court. Litigation in state court would reduce the need for federal courts to evaluate the claims in the first instance, without the benefit of state court consideration. *Cf. Wainwright*, 433 U.S. at 89-90 (explaining that if state appellate courts know that federal issues "raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal[,]" they will have to choose "between addressing the issue notwithstanding the petitioner's failure to timely object, [and] fac[ing] the prospect that the federal habeas court will decide the question without the benefit of their views"). Any impact on state and federal courts' workload created by giving effect to the *Avena* Judgment would be de minimis and would have no long term effect on the state judicial systems.

III. There are no structural barriers to implementing the *Avena* Judgment.

In *Medellin v. Dretke*, 544 U.S. 660 (2005), this Court noted several potential problems with reconciling the ruling of the ICJ in the *Avena* Judgment with the procedural requirements in federal habeas proceedings. For example, the Court cited the likely difficulty in showing that a violation of consular access provisions was more than a "nonconstitutional lapse[] [the Court had] held not to be cognizable in a [federal] postconviction proceeding." *Id.* at 664 (quoting *Reed v. Farley*, 512 U.S. 339, 340 (1994)). The Court also noted that the non-constitutional nature of the treaty violation could impede the grant of a certificate of appealability, as required by 28 U.S.C. § 2253(c). *Id.*

The structural source of these difficulties is the "full parity" between treaties and federal statutes. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion). These types of treaties and federal laws have the same status under Art. VI of the Constitution—they are the "supreme Law of the Land." Reconciling countervailing commands from coequal sources of law can give rise to problems of interpretation that may ultimately alter the scope of treaty obligations, but that interpretation remains firmly in the province of the federal government. It is an entirely different situation when a treaty and state law contain conflicting commands; in that instance, the treaty trumps state law. *See Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law.").

Moreover, the Constitution imposes an independent obligation on states to enforce federal law in their own courts

absent an express exemption from Congress. *See Tafflin v. Levitt*, 493 U.S. 455, 469-70 (1990) (Scalia, J., concurring) ("'[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State. . . .'") (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)). Accordingly, a State *must* recognize and implement treaties even if they are inconsistent with its laws. *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement.").

In sum, because the Vienna Convention is a treaty to which the U.S. remains a party, and the United States was a party to Optional Protocol when the *Avena* Judgment was handed down, the several states and their courts are bound to honor that decision. Thus, the Texas Court of Criminal Appeals should not be permitted to alter the scope of the United States's treaty obligations by invoking its state procedural bar to dispose of Mr. Medellin's Article 36 claims in a manner inconsistent with the *Avena* Judgment.

IV. Giving effect to the *Avena* Judgment promotes the international rule of law.

As this Court has observed: "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own

nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The Vienna Convention is designed to enable countries to help their own nationals when those nationals are abroad, in part by agreeing to allow other countries to take similar steps where their citizens are concerned.

The United States used the dispute resolution mechanism provided by the Optional Protocol to enforce the protections specified in the Vienna Convention to protect its own citizens when it brought an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15), 1980 I.C.J. 3 (May 24). In bringing that application, the United States relied on the Optional Protocol's establishment of the ICJ's compulsory jurisdiction over disputes arising out of the interpretation or application of the Vienna Convention. When the ICJ ruled in favor of the United States provisionally in 1979 and then finally in 1980, 1979 I.C.J. 7, 1980 I.C.J. 3, the United States insisted that Iran was bound to comply with the court's judgment. *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, at 9 ("The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Tehran Government to carry out its provisions.").

Allowing state courts to refuse to abide by an ICJ judgment that was rendered while the United States was a party to the Optional Protocol would compromise important structural protections established by the Constitution to ensure that the federal government alone controls when the United States will consent to treaties and other international agreements. The President's signature on the Optional

Protocol, the Senate's ratification of that treaty, and the United States's submission to proceedings before the ICJ through to judgment, all reflect decisions committed exclusively to the federal government in the conduct of foreign affairs, superior to any state law. But they also reflect a fundamental commitment to the rule of law. Although President George W. Bush has now withdrawn the United States from the Optional Protocol, the President himself has expressed the importance of honoring this federal commitment, and his expectation that the courts of the United States would comply with the *Avena* Judgment in this case. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 41-42, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). This commitment to honor treaty obligations, even when they are potentially inconvenient or contrary to individual state interests, reflects the essence of the rule of law.

CONCLUSION

For the reasons set forth above, and consistent with its commitment to promoting the rule of law, the ABA respectively submits that the Court should reverse the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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FILED
AUG 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF OF THE COMMONWEALTH OF VIRGINIA, 27 OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF TEXAS

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QUESTIONS PRESENTED

The States' brief will address the following questions:

1. May a private party enforce a judgment of the International Court of Justice?

2. Does the President's Determination – that a private party should be able to enforce a judgment of the International Court of Justice in state court, notwithstanding applicable state – law procedural bars – violate congressional intent to preserve the autonomy of the States to adjudicate criminal cases based on state rules?

3. Does the constitutional principle of dual sovereignty preclude the President from commandeering state courts as the sole mechanism for enforcing a treaty obligation?

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INTEREST OF AMICI

The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). By dividing sovereignty between the National Government and the States, the Constitution ensured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 291 (James Madison).[1] Thus, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868). This division of sovereignty "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). Indeed, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The President's implementation of the Nation's treaty obligations cannot repudiate this "defining feature of our Nation's constitutional blueprint." *Federal Mar.*

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[1] *See also The Federalist No. 28*, at 149 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government"). Throughout this Brief, all page number citations to *The Federalist* are from *The Federalist Papers* (Clinton Rossiter, ed., 1961, Mentor Books Ed. 1999).

Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 751 (2002).

Today, the United States is extensively involved in international business and cultural exchanges, in military cooperation or conflict, and has ratified treaties governing a host of subjects. Seeking to comply with a decision of the International Court of Justice, the President has made a determination that he may set aside state law in a non-emergency situation. Such sweeping authority, if sanctioned, would dramatically undermine the sovereignty of the States.

The States do not dispute that that the President has a significant interest in complying with *Case Concerning Avena & Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128 (Mar. 31), ensuring security of United States citizens abroad, promoting good relations with Mexico and other foreign nations, and reinforcing our Nation's commitment to the rule of law. Nevertheless, this Court must not "confus[e] the issue of a power's validity with the cause it is invoked to promote." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). The result sought here, a review of certain specified convictions to determine whether any prejudice ensued from a violation of the *Vienna Convention on Consular Relations*, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262, can be accomplished by methods other than the President's unprecedented intrusion into state sovereignty.[2]

SUMMARY OF ARGUMENT

First, Medellin cannot enforce the decision of the International Court of Justice. Decisions of the International Court of Justice bind Nations, not private parties. Nothing in the establishment of the International

---

[2] For example, Congress could amend federal habeas corpus law to allow limited judicial review for certain individuals.

Court of Justice indicates an intent to allow private parties to enforce its judgments in domestic courts. Moreover, allowing private parties to enforce decisions of the International Court of Justice in domestic courts would have undesirable effects.

Second, the President's unilateral determination that private parties should be able to enforce a decision of the International Court of Justice contravenes Congressional intent. While the President has broad discretion in the area of foreign relations, his power is at its lowest ebb when he operates contrary to the intent of Congress. In ratifying the Vienna Convention, Congress did not create any private rights or disrupt state law. Moreover, through the Anti-terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 ("AEDPA"), Congress expressed its intent to preserve state criminal judgments from federal interference. Furthermore, congressional approval of presidential action in other contexts does not justify his actions here. Additionally, the President's actions conflict with the previous positions of the Executive Branch concerning the scope of the Vienna Convention.

Third, if this Court reaches the constitutionality of the President's Determination, then the President's Determination is unconstitutional. The Treaty Clause cannot be used to expand the powers of the National Government at the expense of the States. If the National Government cannot accomplish an objective directly, then it cannot use a treaty to accomplish the objective indirectly. Moreover, the President cannot commandeer state judges as the exclusive means of implementing a treaty. Similarly, under our constitutional arrangement, the President cannot direct the state judiciary to reopen a judgment in a criminal case.

ARGUMENT

I. MEDELLIN CANNOT ENFORCE THE JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE.

Following the cataclysm of the Second World War, the nations of the world established a variety of institutions designed to prevent future conflicts. One of these institutions is the International Court of Justice ("ICJ"), which provides a forum for *Nation States* to resolve their disputes without resort to violence. In asserting that private parties can enforce the judgment of the ICJ, Medellin's argument rests on a non-sequitur. He contends that because the *United States* is morally obligated to comply with the judgment of the ICJ in *Avena*, he can go to a State Court as a *private litigant* to enforce the judgment. The fact that Medellin's case was one of the cases that prompted Mexico to seek a judgment from the ICJ does not transmute the ICJ's judgment into one that a private party can enforce in a domestic court.

Under the treaty creating the ICJ, only Nation States can be parties before it. *Statute of the International Court of Justice*, Art. 34, 59 Stat. 1059 (1945). Medellin is a private party. Moreover, the decisions of the ICJ have "*no binding force* except between the parties and in respect of that particular case," *id.*, Art. 59, 59 Stat. 1062 (emphasis added). Two parties are before this Court: Medellin and Texas. Neither Texas nor Medellin was a party before the ICJ.

The travaux preparatoires of both the United Nations Charter and of the ICJ's Statute are barren of any discussion concerning domestic judicial enforcement of the ICJ's judgments. *See* United Nations Information Organization, 13 Documents of the United Nations Conference on International Organization, San Francisco, 1945, at 297-98; *id.*, vol. 14 at 209-10, 853. First, considering the wide variety of judicial systems in the world, this silence cannot be reconciled with automatic

judicial enforcement by private parties.[3] Second, during the debate concerning the ratification of the U.N. Charter, the Executive Branch offered testimony that the exclusive means for enforcing the judgments of the ICJ was through the Security Council.[4] Indeed, domestic enforcement of the ICJ's judgment would likely have derailed Senate ratification. As one author has noted,

> Ever since the movement in 1919 for a League of Nations, the Senate of the United States had been almost violently hostile to the concept of an international organization which might have or exercise authority to encroach on American domestic preserves. The representatives of the State Department of the United States at San Francisco were keenly aware of this hostility and of the need for Senate ratification of the instruments to be negotiated there in 1945.

Eberhard P. Deutsch, AN INTERNATIONAL RULE OF LAW 213 (1977).

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[3] Furthermore, given the lack of judicial independence of many of the world's judiciaries, a right of judicial enforcement would be a hollow remedy.

[4] The Charter of the United Nations: Hearings before the Senate Comm. on Foreign Relations, 79th Cong., 1st Sess. 286 (1945) (Statement of Leo Pasvolsky, Special Assistant to the Secretary of State); Hearings on S. Res. 196 before a Subcomm. of the Senate Comm. on Foreign Relations, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, Legal Advisor of the Department of State). The debate over an amendment proposed by Senator Connally demonstrates the understanding of the Senate that the ICJ's judgments were to be enforced exclusively through the Security Council. *See generally* 92 Cong. Rec. 10694-95. *See also* Per Majid, *The Post-Adjudicative Phase*, 326-35 in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court (Connie Peck & Roy S. Lee, eds., 1977) (noting that the judgments of the ICS are enforced thought "self help" and by resort to the Security Council).

Third, Medellin and his amici have not supplied any instances of foreign courts ascribing binding force to a judgment by the ICJ under domestic law.[5] Finally, a Panel on the Future of the International Court of Justice from the American Society of International Law recommended in 1973 that nations who were parties to the ICJ's Statute should "make provision in their domestic law for the execution of decisions rendered by the Court."[6] This recommendation by a body of experts would be entirely superfluous if judgments of the ICJ can be enforced automatically by private parties in the domestic systems of member nations. Indeed, this Court noted in *Sanchez-Llamas v. Oregon* that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." 126 S. Ct. 2669, 2684 (2006).

Requiring courts to enforce the often politically sensitive determinations by the ICJ would inject the courts, including state courts, into sensitive foreign policy disputes for which they are ill suited to resolve. For example, after Nicaragua obtained an ICJ judgment against the United States, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14 (June 27), Nicaragua sought action by the Security Council to enforce the treaty. In response, the United States vetoed the Security Council Resolution. Under Medellin's view, private litigants disenchanted with this outcome could

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[5] To the contrary, courts have considered these judgments as persuasive but not binding. *Anglo-Iranian Oil Co. v. Idimitsu Kosan Kabushiki Kaisha*, 20 I.L.R. 305 (Japan, High Ct. Tokyo 1953), *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, 22 I.L.R. 23 (Italy, Civ. Ct. Rome 1954) (same). *See also Socobel v. Greek State*, 18 I.L.R. 3-5 (Belg. Trib. Civ. de Bruxelles 1951) (holding that the judgments of the predecessor to the ICJ, the Permanent Court of International Justice, were not domestically enforceable by private parties.).

[6] Leo Gross, *Conclusions*, in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 727, 731-32 (Leo Gross ed., 1976).

have sought and obtained an injunction from a domestic court to enforce the judgment of the ICJ.

In sum, Medellin, as a private party, cannot enforce a judgment of the ICJ in a domestic court. Unless the President can confer upon Medellin a private right of action to enforce the judgment, his litigation must be dismissed. As explained below, the President's Determination is invalid because it is contrary to the intent of Congress.

II. THE PRESIDENT'S UNILATERAL DETERMINATION THAT PRIVATE PARTIES CAN ENFORCE *AVENA* CONTRAVENES CONGRESSIONAL INTENT.

The Framers of our Constitution sought to "diffuse[] power the better to secure liberty." *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Consequently, the Nation's power to conduct foreign affairs is not vested exclusively in one branch of the National Government. While the Executive Branch carries out the foreign policy of the United States, the Constitution vests Congress with considerable authority in this area. Congress has the power to regulate commerce with foreign nations, to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, to declare war, to raise and support armies and to provide and maintain a navy. U.S. Const. art. I, § 8, cl. 11-13. Furthermore, the Senate must ratify treaties and approve ambassadors. U.S. Const. art. II, § 2. Finally, Congress may effectively repeal treaties by enacting subsequent legislation. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (when a statute and a treaty cannot be reconciled, the "one last in date will control the other.").

The Framers also sought to ensure that the National Government would be responsive to the States. The

Constitution safeguards state interests with respect to the Treaty Power by requiring Senate ratification by a super-majority of Senators. U.S. Const. art. II, § 2. Originally, the Senators were elected by the legislatures of the various States. U.S. Const. art. I, § 3, cl. 1. This system ensured a high degree of sensitivity to State concerns. That sensitivity may be reduced with the direct election of Senators, U.S. Const. amend. XVII, § 1, but even the modern process of Senate ratification provides some measure of protection for the States' interests. James Madison relied on these structural protections to dismiss arguments that the powers vested in the National government would prove "dangerous to the portion of authority left in the several States." *The Federalist No. 45*, at 256 (James Madison).[7]

Given the shared responsibility between Congress and the President and the importance of Senate ratification under our constitutional system of dual sovereignty, the authority of the President has been analyzed according to three tiers:

(1) "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Judicial deference, in these circumstances, is at its apex. *Id.* at 636-37 (Jackson, J., concurring).

(2) "When the president acts in absence of either a congressional grant or denial of authority, he can only rely

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[7] *See also The Federalist No. 69*, at 388 (Alexander Hamilton) (contrasting United States Constitution, which requires Senate ratification of treaties, with the British system, where "the prerogative of making treaties exists in the crown in its utmost plentitude."); *The Federalist No. 46*, at 265 (James Madison) (noting that the Congress will be "disinclined to invade the rights of the individual States, or the prerogative of their governments.").

upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637 (Jackson, J., concurring). The legal validity of the challenged Presidential action will likely "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* (Jackson, J., concurring).

(3) "When the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain executive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring).[*]

In this instance, the President's Determination falls in the third tier, where presidential power is at its lowest ebb. Quite simply, the President's Determination that private parties can enforce *Avena* is contrary to the will of Congress. In ratifying the Vienna Convention, Congress did not intend to create any private rights or displace the state law rules of default. The President's Determination conflicts with the will of Congress to protect state judgments in criminal cases.

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[*] *See also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2007); *Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

A. The President's Determination is Contrary to the Will of Congress.

1. In Ratifying the Vienna Convention, the Senate Did Not Intend to Create Private Rights of Action or Disrupt Ordinary Rules of Default.

As the United States consistently has argued in great detail, the Vienna Convention does not create any private rights of action that are judicially enforceable. *See Brief for the United States as Amicus Curiae Supporting Respondents* at 11-30, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 04-10566 and 05-51); *Brief for the United States as Amicus Curiae Supporting Respondent* at 18-30, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) ("Article 36 of the Vienna Convention . . . does not give a foreign national a judicially enforceable right to challenge his conviction or sentence.").[9] Congress has never sought to contradict this interpretation. Because the Vienna Convention itself, as ratified by the Senate, does not confer any private right of judicial redress, the Executive Branch cannot unilaterally confer such a right on a private party.

Allowing Medellin to reopen his case also would violate Congress' intent for the Vienna Convention to honor the application of state rules of procedural default. As this Court noted in *Sanchez-Llamas*, 126 S. Ct. at 2687, claims under the Vienna Convention may be subjected to ordinary rules of procedural default.[10] In ratifying the Vienna Convention, the Senate relied on the Executive Branch's assertions that the Vienna Convention would not

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[9] *See also Brief for Virginia* at 10-24, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (*sub nom. Bustillo v. Johnson*) (No. 05-51).

[10] Therefore, the Vienna Convention differs from situations where a federal treaty is designed to preempt State law. *See, e.g., Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 457 (1806) (state statute of limitations preempted by federal treaty). Here, the federal treaty honors rather than displaces state rules of criminal procedure.

disturb existing law for the States. S. Doc. Exec. E., 91st Cong., 1st Sess. (1969) (statement by the Chairman of the Senate Committee on Foreign Relations concluding that "the Convention does not change or affect present U.S. laws or practice."). The Executive Branch submitted written testimony assuring Congress that the Vienna "Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions," except with respect to a warrant requirement not relevant here. *See also* Appendix, S. Doc. Exec. E., 91st Cong., 1st Sess. (1969). *See also* Statement before the Senate Committee on Foreign Relations, S. Exec. Rep. No. 91-9, 91st Cong. at 5 (May 8, 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Dep't of State) (advising the state governors that the United States Department of State did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States."). The Senate sought and obtained assurances that the Vienna Convention would not displace ordinary rules of state criminal procedure. Allowing a private litigant to set aside these rules of procedural default would conflict with Congressional intent.

2. Congress Has Protected the Final Judgments of States Courts Through the AEDPA.

In enacting the AEDPA, Congress codified significant protections for the judgments of state courts in criminal cases. The litigation in the ICJ over the United States' obligations under the Vienna Convention has continued for more than a decade. *See Case Concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States)* 1998 I.C.J. (April 7). In the face of this high-profile and long-running litigation, Congress has

never diluted the protections afforded to State criminal judgments by the AEDPA. The President's Determination thus violates Congress' intent to protect state final judgments in criminal cases. While the AEDPA protects state criminal judgments from collateral attack in federal courts, it reflects Congress' recognition of the indignity suffered by the States when their judgments are set aside by a branch of the National Government.

B. Congress' Implicit or Explicit Approval of Presidential Action in Other Contexts Does Not Validate the Unprecedented Determination Made Here.

In more than 200 years of constitutional history, the Nation has suffered its share of wars and diplomatic crises. It is telling, given this history, that neither Medellin nor the United States can cite a single instance of a President ordering a state court to reopen and readjudicate a final judgment. To overcome this glaring deficiency, the United States and Medellin must fall back on broad propositions and inapposite authority to create the illusion of Congressional support for the President's action.

1. The President's Actions to Implement Past ICJ Decisions Do Not Justify the Determination Made Here.

The United States claims that Congress has accorded the Executive Branch broad latitude in implementing the decisions of the ICJ. *United States Amicus Br.* at 19. None of these implementation actions, however, involved a command to a State to set aside a final judgment. For example, the measures taken by the President to adjust the United States' boundary with Canada, based on an ICJ decision, hardly resemble the uniquely intrusive determination in the case at bar. *Id.* at 20. None of the

examples cited in the United States' brief flew in the face of strong Congressional policy such as the one enacted into law through the AEDPA and through the ratification of the Vienna Convention. Put differently, although the President has the power to take *some* unilateral steps to enforce ICJ decisions, the President does not have the power to take *any and all* unilateral actions.

The United States stresses that the President must be permitted to act expeditiously in responding to an ICJ decision to avoid endangering certain foreign policy objectives. *United States Amicus Br.* at 12. The States do not dispute the need for prompt action in certain circumstances. That prompt action, however, cannot flout the will of Congress or the limits of the Constitution. Furthermore, the need to act with dispatch is not justified here. There is no mention in the President's Determination of any crisis or of the need for expedited action. Indeed, the President made his Determination almost one year after the ICJ's decision in *Avena*. Furthermore, the remedy itself consists of protracted litigation.

Other statutes relied upon by the United States are similarly bereft of Congressional authorization for the President's Determination. The statute delineating the President's interaction with the United Nations, 22 U.S.C. §§ 287 through 287t, contains nothing that would justify the President's Determination. The United States does not point to any specific provision of this statute that would authorize the Determination at issue. The same applies to the Senate's ratification of the Optional Protocol. The Optional Protocol, which is itself a part of the Vienna Convention, does not salvage the President's Determination. *Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes*, 21 U.S.T. at 326, 596 U.N.T.S. at 488. The Optional Protocol is silent about private rights of action and does not authorize the President to set aside

and reopen the judgments of state courts. Rather, it simply consents to the jurisdiction of a tribunal that requires the consent of the parties to adjudicate a particular controversy.[11]

2. Other Executive Branch Practices Do Not Justify the President's Determination.

Medellin and the United States attempt to fit the President's unprecedented Determination into longstanding practices of the Executive Branch. The United States notes that the Executive Branch unilaterally has preempted state law in the past in resolving disputes with foreign nations. *United States Br.* at 12-16. None of the cases cited in support of this proposition involved Presidential action that conflicted with the provisions of a ratified treaty as well as Congressional policy, and none of these cases required a state court to reopen and readjudicate a concluded criminal case. Rather, the cases address the authority of the Executive Branch to settle international property disputes.

United States v. Pink, 315 U.S. 203, 213-14 (1942) and *United States v. Belmont*, 301 U.S. 324, 328-31 (1937), addressed property claims against Russian corporations under the Litvinov Agreement, an executive agreement that, among other things, afforded diplomatic recognition of the U.S.S.R. by the United States. The agreement turned over certain property to the United States government and permitted the United States to use that property to satisfy claims against the U.S.S.R. *Belmont*, 301 U.S. at 222-23. When New York refused to implement this arrangement, the Court held that New York law must yield to the Litvinov Agreement. *Belmont*, 301 U.S. at 327; *Pink*, 315 U.S. at 232-34. In other words, the executive

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[11] *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, art. 36 (noting that jurisdiction of the ICJ depends on a nation's consent).

agreement trumped contrary state law. In both cases, the Court stressed that the executive agreement was concluded as a part of the diplomatic recognition process for which the President has broad authority. *Belmont*, 301 U.S. at 330; *Pink*, 315 U.S. at 226-27. Furthermore, the Court emphasized the acquiescence of Congress in the President's action. *Pink*, 315 U.S. at 227-28.

In *Dames & Moore*, 453 U.S. at 662, this Court approved an executive agreement intended, *inter alia*, to resolve the hostage crisis with the revolutionary government of Iran. A recurring source of friction involved claims by United States citizens against the Iranian government and claims by Iranians against the United States and American citizens. *Id.* at 662-67. A claims tribunal was established to resolve these disputes. Presidents Reagan and Carter issued Executive Orders that seized Iranian property and transferred it to an account that would be drawn down to satisfy awards against Iran. The Executive Orders also suspended claims pending in American courts that could be presented to the tribunal. *Id.* at 662-66. The Court upheld the Presidents' actions, relying on the longstanding authority of the Executive Branch to settle claims by American citizens against foreign governments and Congress' long acquiescence in such settlements by the President. *Id.* at 680-82, 687-88.

Finally, in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003), the Court held that a California statute designed to force European insurance companies to pay Holocaust-related claims was preempted by a series of executive agreements. This state statute conflicted with an executive agreement between the United States and Germany, which provided for such claims to be funded by a particular foundation. *Id.* at 406-07. The Court again relied on the President's recognized authority to settle property claims by United States citizens against foreign governments or citizens by executive agreement, a practice

that "has received congressional acquiescence throughout its history." *Id.* at 415. The Court also noted the weakness of the state interest in this area. *Id.* at 420.

The President has participated in the settlement of international property disputes since 1799. *Garamendi*, 539 U.S. at 415. Furthermore, Congress has long acquiesced in this practice. This authority should not be expanded beyond its historical roots and applied to unprecedented assertions of Presidential authority. None of these cases involved Congressional approval or acquiescence for the President to unilaterally compel a state court to reopen a concluded case to satisfy a foreign policy objective. Moreover, none of these decisions suggests that the President may unilaterally preempt any and all state laws in pursuit of a foreign policy objective.

The President's Determination in this case is similar to the authority claimed by the President in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936). In that case, United States citizens were arrested for crimes allegedly committed in France. *Id.* at 6. They filed habeas corpus petitions, arguing that the treaty with France did not authorize the President to extradite United States citizens. *Id.* The Court agreed rejecting the President's argument that a treaty's silence on the subject of the extradition of United States nationals did not preclude the President from extraditing United States citizens. *Id.* at 9. The Court held that "[i]t is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power." *Id.* The Court observed that "[h]istory and practice not only do not support, but they rather negative, the claim of an implied discretionary power." *Id.* at 13. In the case at bar, the President's Determination likewise draws no support from history. To the contrary, it transgresses the ancient and "salutary principle" of res judicata. *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

Similarly, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189-90 (1999), this Court invalidated an Executive Order issued in 1850 by President Taylor. The order removed Native Americans from certain lands. *Id.* at 188. The Executive Order was invalid, the Court concluded, because the 1837 Treaty on which it was based "makes no mention of removal, and there was no discussion of removal during the Treaty negotiations." *Id.* at 189. If a treaty's *silence* does not confer a particular power on the President, then the President cannot claim authority to remedy a violation of a treaty in a way that contravenes the terms of the treaty. In ratifying the Vienna Convention, Congress sought to protect the criminal law systems of the States. The President's action violates this Congressional intent.

It is also significant that the authority asserted by the President to set aside unilaterally and reinstitute concluded state litigation conflicts with the will of Congress, and with prior determinations by the Executive Branch concerning the scope of its authority. In its brief before this Court in *Breard v. Greene*, 523 U.S. 371 (1998), the United States took the view that

> [o]ur federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The 'measures at [the United States'] disposal; under our Constitution may in some cases include only persuasion – such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution – and not legal compulsion through the judicial system. That is the situation here.

Brief for the United States as Amicus Curiae at 51 (Nos. 97-1390 and 97-8214). Following the ICJ's decision in *LaGrand*, *(Federal Republic of Germany v. United States)*, 2001 I.C.J. 466 (June 27), the President encouraged the States to consider any violation of the Vienna Convention as a part of their clemency and parole

process. *See United States Amicus Br.* at 20-21. Prior assessments of the scope of Executive authority undermine the sweeping claim of unilateral authority made in the case at bar.

In resolving this case, the States stress that the Court need not spell out the precise contours of presidential power. Rather, it is sufficient to hold that when the Senate ratifies a treaty that honors state rules of procedural default and does not confer private rights of action, the President lacks the authority unilaterally to create a remedy that circumvents this congressional intent. This conclusion draws added force from Congress' protection of state court judgments in criminal cases through the AEDPA. Such a holding would not only be faithful to the text and history of the Vienna Convention, it also would avoid thorny Constitutional questions regarding the conflict between the unprecedented Presidential authority claimed by the Executive Branch in this matter and the residuum of sovereignty the Constitution reserves to the States.[12]

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[12] To the extent Medellin's action constitutes a civil cause of action rather than the reopening of a criminal case, sovereign immunity bars such a cause of action. Sovereign immunity does not preclude this Court from reviewing federal issues surrounding a state criminal conviction, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 392 (1821), nor does it preclude this Court from examining in a habeas corpus action whether a state inmate is being detained in violation of United States law. *See, e.g., Bustillo v. Johnson*, *cert. granted*, 126 S. Ct. 621 (2005), *aff'd sub nom. Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). Habeas proceedings are typically against the jailer, not the sovereign, and, thus, sovereign immunity is not implicated. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). In this proceeding, however, the sole respondent is the State of Texas. Medellin is bringing a federal law claim – that the President's Determination that compliance with a treaty requires the Texas courts to ignore state law – against a State. Unless validly abrogated by Congress, waived by the State, or surrendered in the plan of the Constitutional Convention, sovereign immunity bars any federal claim against the State. *Alden v. Maine*, 527 U.S. 706, 755-56 (1999). This attribute of sovereignty applies to treaties as well as to statutes, which share equal dignity under the Supremacy Clause.

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III. THE PRESIDENT'S DETERMINATION CONTRAVENES THE PRINCIPLE OF DUAL SOVEREIGNTY.

In the event the Court reaches the constitutionality of the President's Determination, the President's Determination violates the Constitution. In our constitutional system of dual sovereignty, the Executive Branch cannot require that state courts serve as the exclusive vehicle to enforce

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Moreover, Medellin cannot circumvent Texas' sovereign immunity by asserting that he is merely enforcing the obligations of the United States. "The consent, 'inherent in the convention,' to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991). *See also United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 883 (D.C. Cir. 1999) ("To assume that the United States possesses plenary power to do what it will with its Eleventh Amendment exemption is to acknowledge that Congress can make an end-run around the limits that that Amendment imposes on its legislative choices."). Even if the United States constitutionally may delegate its sovereign exemption, it has not done so. "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). "[T]he clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 544 (2002). Thus, if Medellin is going to claim that the United States' sovereign exemption has been delegated to him, he must identify a statute that clearly and unambiguously delegates the sovereign exemption. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) ("Because Congress did not clearly and unambiguously state that a State was a "person" under the False Claims Act, a *qui tam* relator could not bring suit on behalf of the United States against a State").

an international obligation and that they do so by reopening a final judgment in a criminal case.

A. The Treaty Clause Cannot Be Used To Expand the Powers of the Federal Government to the Detriment of the States.

The constitutional principle of dual sovereignty applies when the President negotiates and the Senate ratifies a treaty. Michael D. Ramsey, *The Treaty Clause* in THE HERITAGE GUIDE TO THE CONSTITUTION 205, 207 (Edwin Meese III, Matthew Spalding, & David Forte, eds., 2005) ("A treaty presumably cannot alter the constitutional structure of government. . . ."). "It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions." *Reid v. Covert*, 354 U.S. 1, 17 (1957). The National Government "is one of limited powers" and its authority cannot be "enlarged under the treaty-making power." *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836). "[A] treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870). Consequently, "the treaty power should be subject to the same federalism limitations that apply to Congress' legislative powers. [The National Government] should not be able to use the treaty power (or executive agreement power) to create domestic law that could not be created by Congress." Curtis A. Bradley, *The Treaty Power & American Federalism*, 97 MICH. L. REV. 390, 450 (1998) (parenthesis in original).[13]

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[13] *See also id.* at 456 ("Under this approach, the treaty power would not confer any additional regulatory powers on the federal government,

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Put another way, the Treaty Clause does not "authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). If Congress and the President cannot accomplish an objective directly using the powers conferred upon them by the Constitution, then they may not use the Treaty Clause to accomplish the same thing *indirectly*. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) ("[T]the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students."). For example, since Congress cannot abrogate the States' sovereign immunity for intellectual property claims directly, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999), it cannot use the Treaty Clause to abrogate sovereign immunity *indirectly*. *See* Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713 (2002) (concluding that the States' sovereign immunity cannot be abrogated through the Treaty Power).[14] If the President

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just the power to bind the United States on the international plane. Thus, for example, it could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress's legislative powers, such as the legislation at issue in the recent *New York*, *Lopez*, *Boerne*, and *Printz* decisions."). *Cf.* Ramsey, *supra*, at 207 ("The revival of interest in federalism limits on Congress in such areas as sovereign immunity and the Tenth Amendment raises the question of whether these limits also apply to the treaty power . . . ").

[14] *See also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 683 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin.")

cannot require state courts to reopen and readjudicate criminal cases pursuant to a statute, then he may not do so pursuant to a treaty.

Missouri v. Holland, 252 U.S. 416 (1920), might be viewed as holding that the National Government can expand its powers vis-à-vis the States by entering into treaties with foreign nations.[15] This expansive view of *Holland* "is in deep tension with the fundamental constitutional principle of enumerated legislative powers." Nicolas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005).[16] The better view of *Holland* is that it held there are some actions that the National Government can take pursuant to the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, that it cannot take pursuant to the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.[17] In other words, the Treaty Clause confers a different

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[15] *See* Richard A. Epstein, *Smoothing the Boundary Between Foreign and Domestic Law: Comments on Professors Dodge, Golove, and Stephan*, 52 DEPAUL L. REV. 663, 667 (2002) ("The treaty power imposes no specific subject matter limitation on the President or Senate."); Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U. L. REV. 735, 750 (2001) ("Today . . . most scholars support the view that the treaty power has no subject-matter limitation."); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 838 (2001) ("[U]nlike statutes, treaties have no defined subject matter, which means that the treaty makers can enter into an international agreement on any matter, regardless of whether the Constitution grants control over it to another branch.").

[16] *Compare Australia v. Tasmania*, (1982) 158 CLR 1 (Austl.) (National Government of Australia can expand its powers vis-à-vis the Australian States by entering into treaties) with *Canada v. Ontario*, [1937] A.C. 326, 354 (P.C.) (appeal taken from Can.) (National Government of Canada cannot expand its powers vis-à-vis the Provinces by entering into treaties).

[17] Moreover, there was no issue that state game wardens were improperly commandeered to implement the treaty *Holland*, 252 U.S. at 431. The treaty was to be carried out by "officers of the United States." *Id.* at 434.

(and in some cases broader) power than that conferred by the Commerce Clause. *See* Bradley, *supra*, at 426.[18] While this interpretation of *Holland* still results in a broad Treaty Clause power for the National Government, it preserves the constitutional principle of dual sovereignty as a substantive limitation on the Treaty Clause. *See* Charles Cooper, *Reserved Powers of the States* in THE HERITAGE GUIDE TO THE CONSTITUTION 371, 374 (Edwin Meese III, Matthew Spalding, & David Forte, eds., 2005) ("Even if modern developments permit (or require) expansion of congressional authority well beyond its eighteenth century limits, such expansion cannot extinguish the 'retained' role of the states as limited but independent sovereigns.").

To adopt the expansive view of *Holland* would mean "the treaty power may be used to evade the limits that the Supreme Court has marked on the legislative power of Congress [and the executive power of the President]." Rosenkranz, *supra*, at 1871. For example, although the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb through 2000bb-4, is unconstitutional as applied to the States, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), Congress conceivably could use the *International Covenant on Civil and Political Rights* (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (approved by the United States Senate on Apr. 2, 1992), to impose an identical statute on the States.[19] Similarly, while some aspects of

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[18] *See also* C.M. Micou, Comment, *The Treaty Making Power and the Constitution*, 6 CORNELL L.Q. 91, 95 (1921) (offering a similar interpretation of *Holland*).

[19] *See* Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 53 (1997) ("[I]CCPR Article 18 probably does not provide a proper basis for upholding RFRA as enacted in 1993, although it would support a verbatim reenactment of the statute if Congress so chose."); Jeri Nazary Sute, *Comment, Reining RFRA: Congressional Use of Treaty-Implementing Powers To Protect Religious Exercise Rights*, 12 EMORY INT'L L. REV. 1535, 1538 (1998) ("Congress's treaty-implementing power appears to provide a strong constitutional

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the Violence Against Women Act, 42 U.S.C. § 19381, are unconstitutional, *United States v. Morrison*, 529 U.S. 598, 627 (2000), the ICCPR conceivably would empower Congress to enact the same provisions.[20] Such circumventions of this Court's holdings regarding the limits of federal authority would be contrary to our constitutional structure and tradition. As this Court is the ultimate arbiter of the Constitution, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), *Flores* and *Morrison* can be overruled only by constitutional amendment, not by treaty.

The intrusion on state sovereignty is even more acute where, as here, the President acts unilaterally. A few examples demonstrate the breadth of the power claimed

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basis for a revised statute protecting religious exercise. . . . Such action also should be taken to fulfill the obligations that the United States accepted when it ratified the [ICCPR] in 1993.").

[20] *See* Catharine A. MacKinnon, *The Supreme Court, 1999 Term – Comment: Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 167 (2000) ("The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, supports congressional use of the legislative power to address violence against women in society and under law." (footnote omitted)); Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power To Implement Treaties*, 25 MICH. J. INT'L L. 265, 274 (2004) ("I consider whether the civil remedy provision of the Violence Against Women Act (VAWA), struck down in *Morrison*, could be reenacted as implementing legislation for the International Covenant on Civil and Political Rights . . . and conclude that it could have." (footnotes omitted)); Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 HOUS. J. INT'L L. 209, 221 (2000) ("[I]t is clear that Congress has power under the Constitution to enact the Violence Against Women Act partly to better effectuate the human rights of women to freedom from domestic violence. . . . Choice and power of our national political branches to effectuate international law, especially in view of the Supremacy Clause, provide an overriding constitutional propriety of the VAWA regardless of the reach of the commerce power.").

for the President. The death penalty has been a frequent source of friction in the United States' relations with Europe. Under Medellin's theory, a future President might conclude that, to ameliorate our relations with this critical trade and military ally, the States must abolish the death penalty. Conversely, a future President might respond to persistent criticism that the United States has not taken sufficient measures to combat drug trafficking by ordering States to impose the death penalty on drug kingpins - including States that have decided to eliminate the death penalty. A President could respond to international frustration with the tort system in the United States by ordering States to set aside certain product liability judgments. Or a President might unilaterally determine that certain environmental protections enacted at the state level would hamper good relations with foreign nations, because these laws will reduce the export of critical foodstuffs to nations that need them. If so, the President could make a determination that these States' environmental statutes must be disregarded in the interest of good international relations. Finally, some nations in the world view single-sex marriage or adoption by single-sex couples as an advance for individual rights, while other nations view these practices with strong disapproval.[21] Under the sweeping power asserted in the case at bar, nothing would preclude the

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[21] The Charter of Fundamental Rights of the European Union, in Article 21, prohibits discrimination based on sexual orientation. *See* Charter of Fundamental Rights of the European Union, art. 21, 2000 O.J. (c. 364) 21, available at http://www.europarl.eu.int/charter/pdf/text_en.pdf. In addition, the European Parliament has passed a number of resolutions condemning homophobia. *See, e.g.*, European Parliament, Resolution of April 27, 2007 on Homophobia in Europe (noting previous resolutions on the subject), P6_TA-PROV (2007) 0167. Other nations, however, impose punishments such as whipping or even death for sexual activity by homosexuals. *See* Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, *in* THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 249, 249-342 (Aart Hendriks, Evert van der Veen, & Rob Tielman, eds., 1993).

President from unilaterally determining that States either must recognize, or are forbidden from recognizing these practices. For example, the President could single-handedly determine that for the sake of good relations with the European Union, the States that have amended their constitutions to forbid single-sex marriage must ignore these provisions. Conversely, the President could determine that the States which have recognized single-sex marriage can no longer do so.

Because the Treaty Clause cannot expand the powers of the National Government to the detriment of the States, Medellin cannot rely exclusively on the President's Determination to reopen his final judgment. Rather, Medellin must demonstrate that, separate from any treaty, there is an independent constitutional power that would allow the President to require state judges to reopen a closed case. *Cf. Rumsfeld*, 547 U.S. at 59-60 (In determining whether Spending Clause statute violated the First Amendment, the key issue was whether Congress could enact the legislation directly without violating the First Amendment).

B. The National Government May Not Commandeer State Judges as the Exclusive Vehicle to Implement the National Government's Objectives.

"Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 527 U.S. at 748. Among other attributes of sovereignty, the Constitution "recognizes and preserves the autonomy and independence of the States, – independence in their legislative and independence in their judicial departments." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938). The National

Government may not "pursue federal objectives through the state judiciaries," *Alden*, 527 U.S. at 753. "A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Id.* at 749. The President's Determination purports to promulgate procedural rules uniquely directed at state courts and to force state courts, and only state courts, to reopen their final judgments to satisfy a National obligation. This determination is essentially the same as telling a State that it must adopt a specific law or a specific set of court rules. *Cf. New York*, 505 U.S. at 176 (Congress may not direct States to pass legislation).[1]

State courts of "adequate and appropriate" jurisdiction, *Testa v. Katt*, 330 U.S. 386, 394 (1947), may be required "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power," *Printz v. United States*, 521 U.S. 898, 907 (1997). However, this requirement to hear federal claims is not absolute. A state court may refuse to hear a federal claim if the refusal is based on a state law that bars *both* federal and state claims alike under similar circumstances. *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 4 (1950).[2] Conversely, if the state law bars federal claims, but permits similar state claims, the state court must hear the federal claim. *See Howlett v. Rose*, 496

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[2] *See also Herb v. Pitcairn*, 324 U.S. 117, 123 (1945) (upholding a state court's dismissal of a federal claim under a state law barring jurisdiction in a city court over causes of action arising outside the city, and stating the rule that "the cause of action must not be discriminated against because it is a federal one."); *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377, 387 (1929) (upholding a state court's dismissal of a federal FELA claim based on a state law barring actions by nonresidents against foreign corporations).

U.S. 356, 375 (1990). In other words, in refusing to hear claims, a state court may not discriminate between similar federal and state claims. Here the President's Determination seeks to stand that proposition on its head, by requiring a state court to serve as the exclusive forum for adjudicating a federal claim.

The President's Determination differs in nature from the routine adjudication of federal law by State courts. It purports to command state courts, and only state courts, to reopen and readjudicate a concluded case, for a select group of litigants, when the adjudication in the first instance was proper under state and federal law. This stretches the holding in *Testa* far beyond its historic rationale and impermissibly invades state sovereignty.

C. The National Government Cannot Direct State Courts to Reopen a Final Judgment.

In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), this Court examined a federal statute that allowed plaintiffs in securities actions to reinstate litigation that had proceeded to final judgment. *Id.* at 214-15. When plaintiffs sought to avail themselves of this statute to reopen their cases, this Court rebuffed these attempts holding that the statute violated the doctrine of separation of powers. *Id.* at 225. The Court noted that the Framers understood the Constitution to extinguish the common practice of legislative interference with final judgments, a practice that had been common during colonial times. *Id.* at 221-22. The Framers' desire to end legislative interference with final court decisions cannot be reconciled with the authority claimed here by the President to accomplish this very same object with state courts.[23] "[T]here can be no serious contention . . . that

[23] In addition to vitiating the final judgment of a state court, re-opening the state case would have the effect of rendering a nullity

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the Supremacy Clause imposes greater obligations on state-court judges than on the Judiciary of the United States itself." *Alden*, 527 U.S. at 753.

Of course, a habeas corpus petition, although technically a challenge to the legality of a detainee's incarceration, will, if successful, result in a vacated criminal conviction. *See, e.g.*, *Peyton v. Rowe*, 391 U.S. 54, 58 (1968). In this instance, however, Medellin's habeas claims have been litigated to finality. If Congress cannot alter the statute of limitations for civil securities litigation and order the cases retried, neither can Congress alter the state statute of limitations in concluded civil habeas cases and order these cases relitigated. In either event, the legislative measure violates the doctrine of separation of powers. Therefore, even if the President can claim Congressional approval, the Constitution does not permit him to order Texas to reopen and readjudicate a concluded criminal case.

Indeed, the result is even more egregious when the President's action reaches not only across government branches, but also trespasses upon core aspects of state sovereignty. Because the "States possess primary authority for defining and enforcing the criminal law," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), this Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor*, 529 U.S. 420, 436 (2000).[4] The President's Determination breaches the

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the final judgment of two federal courts with respect to Medellin's federal habeas corpus petition.

[4] *See also McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.").

Constitution's protections of federalism and separation of powers and cannot be sustained.

CONCLUSION

For the reasons stated above, in Texas' Brief, and in the Briefs of the other Amici supporting Texas, the judgment of the Court of Criminal Appeals of Texas should be **AFFIRMED**.

Respectfully submitted,

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No. 06-984

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INTEREST OF *AMICI*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk.

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The signatories of this brief represent a wide range of perspectives on executive authority and judicial federalism. But we all agree that there must be some limits on the power of the President to act unilaterally with the preemptive force of federal law, as well as on the power of the national political branches to interfere with the operation of the state courts. We also agree that, on any plausible view of those limits, the President has transgressed them in this case. Although we appreciate the difficult position that the International Court of Justice has placed the President in with respect to Mr. Medellin's case, our Constitution frequently constrains the means available to pursue even the most commendable ends. Upholding the President's action here

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[2] We file this brief in our personal capacities as scholars; none of our respective universities takes any position on the issues in this case.

would set a dangerous precedent both for Executive authority and for judicial independence.

SUMMARY OF ARGUMENT

This odd case raises fundamental questions about the Executive's authority vis-á-vis Congress and the authority of the national political branches vis-á-vis the state courts. Construing the President's terse and cryptically worded "Memorandum for the Attorney General" as a mandatory directive to the state courts, the United States asserts a unilateral executive authority to preempt neutral state-law limitations on the jurisdiction of the state courts. Such an action would not execute any current international agreement, because the United States has conceded that neither the Vienna Convention on Consular Relations, the Optional Protocol to that agreement, nor the *Avena* judgment of the International Court of Justice require domestic courts to set aside their ordinary rules of procedural default in cases where a foreign national belatedly raises an objection under the Convention. Instead, the President seeks to act unilaterally, asserting that the Memorandum has preemptive effect analogous to that of an Executive Agreement—but without any such agreement. The better analogy is that the President seeks to make a non-self-executing international obligation—the *Avena* judgment—have direct domestic effect, but our law of treaties plainly contemplates that *Congress* must implement non-self-executing international obligations, unless the obligation falls within Executive authority that the President would otherwise possess apart from the agreement. Finally, and most importantly, federal intervention in state criminal proceedings is an area that Congress has delegated to the federal *courts* under the *habeas* statute, which is itself a product of finely calibrated legislative compromise. Executive action to interfere with state court judgments in ways that federal courts could not, because of established limits on their *habeas* jurisdiction, thus falls within the disfavored category

under Justice Jackson's tripartite framework in the *Steel Seizure Case*.

This case also raises fundamental questions of judicial independence. While this Court has held that state courts must hear federal claims if they have jurisdiction adequate to do so, *Testa* v. *Katt*, 330 U.S. 386, 394 (1947), it has never held that this obligation requires a state court to disregard a neutral and general limitation on its jurisdiction. Conversely, by directing state courts to resolve difficult questions concerning their jurisdiction to review defaulted Vienna Convention claims in favor of granting the "review and reconsideration" ordered by *Avena*, the Memorandum unconstitutionally seeks to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). And by requiring the state courts to reopen final judgments concerning the *Avena* prisoners, the Memorandum violates the principle of finality established in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), and *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Although this Court has developed the *Klein* and *Plaut* principles in cases concerning the federal judicial power under Article III, we submit that judicial independence in the resolution of federal claims is no less important in the context of state adjudication. Moreover, the United States has advanced no limiting principle that would confine the President's authority, if upheld here, to interference with *state* courts.

This case is odd because of the mismatch between the fundamental constitutional issues raised by the United States' position and the form and wording of the President's Memorandum itself. That Memorandum is not actually directed to the state courts, it contains no mandatory language, and it speaks instead of "comity." Nothing in it purports to reverse the Executive's position in the *Breard* case, which was that the President possessed only authority to *request* state

officials to heed an ICJ judgment on a Vienna Convention claim—not to compel a halt to an execution. We therefore urge the Court to avoid the constitutional issues presented in this case and interpret the Memorandum as a request that state courts employ all available measures to comply with the *Avena* judgment.

ARGUMENT

I. THE PRESIDENT LACKS CONSTITUTIONAL AUTHORITY TO ISSUE THE ORDER.

As Justice Kennedy recently affirmed, "[t]he proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 . . . (1952)." *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749, 2800 (2006) (Kennedy, J., concurring in part). Because the President's Memorandum falls outside the President's unilateral power to act and runs contrary to the expressed intent of Congress to carefully limit and calibrate federal interference with state criminal proceedings, the President's action here is invalid.

A. The Memorandum Embodies a Discretionary Judgment, Not the Implementation of Pre-Existing Law.

Although the United States seeks to characterize the President's Memorandum as implementing requirements of the Optional Protocol to the Vienna Convention and the United Nations Charter, see Brief of United States, at 8-9, that view contradicts the clear positions taken by the United States in this and similar litigation. Although the Vienna Convention on Consular Relations binds all U.S. courts, the United States has endorsed this Court's holding in *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669, 2682-88 (2006), that the treaty obligation does not override ordinary rules of pro-

cedural default. Brief of United States, at 27-29. Likewise, the United States has endorsed the further holding of *Sanchez-Llamas* that the ICJ ruling in *Avena* itself is not binding on United States courts. See 126 S.Ct., at 2683-2685; Brief of United States as Amicus Curiae (in the Texas Court of Criminal Appeals), at 35-43 (concluding that "an ICJ decision is not privately enforceable").[3]

This means that when the President acts to require domestic courts to comply with the *Avena* ruling and set aside their own rules of procedural default, he is not enforcing a requirement of either *Avena* (which does not bind those courts) or the treaty (which permits application of procedural default).[4] The Memorandum instead represents a discretionary judgment that, in order to further certain foreign policy interests, the state courts should be required to do something more than *Avena* or the treaty require. That judgment is no more an adequate basis for presidential lawmaking than President Truman's judgment that national security required seizure of the nation's steel mills.[5]

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[3] See also *Breard* v. *Greene*, 523 U.S. 371, 375-376 (1998) (per curiam). The United States also agrees with Texas that Medellin on his own may not invoke rights created by Article 36 of the Vienna Convention, because that article by itself does not create rights privately enforceable in United States courts. See, *e.g.*, Brief of United States as Amicus Curiae (in the Texas Court of Criminal Appeals), at 35-43 ("Article 36 does not give a foreign national a private right to challenge his conviction and sentence based on an alleged denial of consular assistance.").

[4] The U.N. Charter adds nothing to the argument, as it only requires compliance with the Vienna Convention and the *Avena* judgment.

[5] Chief Justice Vinson's dissent in *Youngstown* did invoke the U.N. Charter as a basis for President Truman's action, much as the President invokes that treaty here. See 343 U.S., at 668-669.

B. The President Cannot Unilaterally Create Supreme Federal Law.

The Executive has previously conceded that it lacks the power to compel the States to ignore state criminal law in circumstances like these. In *Breard* v. *Greene*, 523 U.S. 371 (1998), the Justice Department argued in its brief that the President's only power over the States in circumstances like these was the power to persuade, not the power to compel:

> "[T]he measures at [the United States'] disposal are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the situation here."

Brief of United States in *Breard v. Greene*, at 51. This Court's opinion in *Breard* appeared to agree that the President's options were limited to "diplomatic discussion[s] with Paraguay" and "a letter to the Governor of Virginia requesting that he stay Breard's execution." *Breard*, 523 U.S., at 378.

That the President's power to interfere with State law in these circumstances is limited to the power of persuasion is consistent with the text of the Supremacy Clause, which does not contemplate a unilateral executive power to preempt state criminal law but rather recognizes only the Constitution, federal statutes, and treaties as sources for valid, supreme federal law. See U.S. Const., Art. VI, cl.2.[6] As Justice Black

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[6] Executive agencies exercising delegated powers may preempt state law, see *Fidelity Fed Sav & Loan Assn* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982), but the United States points to no such delegation here.

observed in the *Steel Seizure Case*, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S., at 588. Yet the President's Memorandum would override state criminal law and rewrite it by replacing the Texas procedural-default rule with one issued unilaterally by the President. The Constitution does not grant the President that kind of unilateral authority.

The United States seeks to justify the President's order by resorting to the Executive's independent authority to act in matters relating to foreign affairs, but that authority does not encompass unilateral preemption of state criminal law. Rather, the President's foreign-affairs power has been recognized as authorizing him to enter into executive agreements with foreign nations, and this Court has held that such agreements will at least sometimes preempt state law. See, *e.g.*, *American Ins. Assn* v. *Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 669-670 (1981); *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324, 326 (1937). Those cases do not cover the present circumstances, however. The relevant agreements between the United States and Mexico are the Vienna Convention and its Optional Protocol, but as we have already discussed, neither of those sources of law mandate what the Memorandum requires. The Memorandum is a unilateral act of executive authority.

Moreover, all of the executive-agreement cases have involved the narrow circumstance of a Presidential agreement to settle civil claims of American nationals against a foreign government. See *Garamendi*, 539 U.S., at 436-438 (Ginsburg, J., dissenting) (stressing the narrowness of the relevant decisions). As Justice Souter was careful to point out in *Garamendi*,

> "Making executive agreements to settle claims of American nationals against foreign governments is a

> particularly longstanding practice, the first example being as early as 1799 . . . . Given the fact that the practice goes back over 200 years [to the first Presidential administration,] and has received congressional acquiescence throughout its history, the conclusion that the President's control of foreign relations includes the settlement of claims is indisputable."

539 U.S., at 415 (internal quotations omitted). This Court has never accorded preemptive effect to an executive agreement outside this narrow context—much less an agreement that intrudes into the State's sovereign authority to enforce its criminal law. Compare *id.*, at 425 (stressing "the weakness of the State's interest, against the background of traditional state subject matter") with *United States* v. *Morrison*, 529 U.S. 598, 617 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."). Given the closely divided court in *Garamendi*, the narrowness of the cases on which it relied, and the evident tension of according full preemptive effect to sole executive agreements with a Supremacy Clause that mentions only treaties, this Court should hesitate to extend the reach of that decision.

The United States' position in this case, however, would wholly disregard the key limit preserved in even the broadest possible reading of *Garamendi*—that is, the presence of a bilateral agreement. See Brief of United States, at 23. But that limit is the only stopping point remaining, if this broad reading of *Garamendi* were adopted, before holding that the President's discretionary determinations have the force of law. The Constitution generally imposes difficult procedural hurdles upon the making of supreme federal law, U. S Const., Art. I, §7, and this Court has rejected pleas that these hurdles may be circumvented in the name of efficiency and good policy. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 448-449 (1998); *INS* v. *Chadha*, 462 U.S. 919, 952, 956-959

(1983). *Garamendi* watered down those safeguards by analogizing a sole executive agreement to a treaty, which must be ratified by a Senate by supermajority vote, but adopting the President's position would eliminate those safeguards entirely. This Court should not mistake *Garamendi*'s exception for the rule that the formal requirements of federal lawmaking are to be respected.

Nor are those requirements without practical value. In particular, sole executive agreements must be reported to Congress under the Case-Zablocki Act, 1 U.S.C. §112(b) (2004), and they generally receive far more scrutiny than unilateral statements of executive policy. By contrast, the odd form of the President's Memorandum is likely attributable to a desire to avoid a public debate on interference with the Texas death penalty at the behest of an international court.

Acknowledging the unilateral power claimed by the President to override state law would give the President an essentially unlimited ability to preempt state law based on the assertion of a foreign-affairs interest. For example, the President could pardon state prisoners—notwithstanding the textual limitation of his pardon power to crimes against the United States, see U. S. Const., Art. II, §2—if doing so would, in his opinion, advance the Government's foreign-policy objectives. Thus, according to the United States, when Texas prepared to execute Karla Faye Tucker in 1998, the President could have halted that execution, overriding state law, because there was a widespread outcry from foreign governments and human rights organizations. See *e.g.*, Resolution on the Death Sentence Passed on Karla Faye Tucker in the United States, 1998 O.J. (C 34) 168 (resolution of the European Parliament strongly condemning the execution). Similarly, the President could preempt state environmental policies aimed at combating global warming if, in his view, the existence of such policies undermined the

United States' position in negotiations with other nations that such policies are infeasible.

In sum, the President's position, if accepted, would afford the Executive a practically unfettered power to override state law based on his mere assertion that preemption serves the foreign policy interests of the United States or somehow relates to a valid treaty. That view of a sweeping Presidential power is unsupported by the constitutional text, and goes far beyond what any previous case has recognized.

C. The President Cannot Legislate to Execute Non-Self-Executing Treaties.

The radical implications of the President's position here are most clearly revealed in the United States' argument that, "when the President acts pursuant to a duly ratified treaty and his own constitutional authority, he acts with the full authority of the United States, and his authority is at its zenith. . . . Presidential action that is expressly or implicitly authorized by a treaty is akin to Presidential action that falls within the first category [under *Youngstown*]." Brief of United States, at 10. As we have noted, the United States has consistently affirmed that obligations imposed by the Optional Protocol and the *Avena* decision are not self-executing. *Id.*, at 28-29. Thus, what the President claims is the authority to decide when and how non-self-executing treaty obligations should be executed, without going to Congress for implementing legislation.

The initial decision whether a treaty is to be self-executing belongs to the treaty makers—that is, the President *with the concurrence of the Senate*. See Restatement (Third) of the Law of Foreign Relations §111 (1987). Courts have thus looked to the intent not only of the President but also of the Senate in determining whether a treaty is self-executing.[7]

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[7] See, *e.g.*, *Igartua-De La Rosa* v. *United States*, 417 F.3d 145, 150 (CA1 2005) (en banc) (looking to "the joint position of the President and

This Court has already determined that decisions of the ICJ are not binding on United States courts, *see Sanchez-Llamas*, 126 S.Ct., at 2683-2685, and the United States concedes that, when it ratified the Vienna Convention and its Optional Protocol, the Senate understood ICJ judgments under that protocol to be non-self-executing. Brief of United States, at 26-27; see also Brief of Texas in Opposition, at 22-24 (canvassing the ratification histories of the U.N. Charter and the Optional Protocol).

Since the Optional Protocol and the U.N. Charter are not self-executing, the question is whether the President's Memorandum can execute them unilaterally. It cannot. The President may execute non-self-executing treaties by actions within the scope of his executive authority—e.g., by withdrawing troops from a disputed territory under his commander-in-chief power or refraining from engaging in torture. But the President may not execute a treaty by doing something that he would not otherwise be empowered to do—that is, in a way that requires legislation. Cases involving non-self-executing treaties thus generally refer to them as requiring execution *by Congress*.[8] The decision to execute a

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the Senate that a treaty is not self-executing"); *Beazley* v. *Johnson*, 242 F.3d 248, 267 (CA5 2001) ("The Senate's intent was clear—the treaty is not self-executing.").

[8] See, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect."); *Foster & Elam* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (observing that non-self-executing treaties function as contracts between nations, "and the legislature must execute the contract before it can become a rule for the Court"); *Igartua-De La Rosa*, 417 F.3d, at 150 (observing that non-self-executing treaties "are not domestic law unless Congress has . . . enacted implementing statutes"); *Beazley*, 242 F.3d, at 267 ("Non-self-executing means that absent any further actions by the Congress to incorporate them into domestic law, the courts may not enforce them."); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (CA7 1985) ("[T]reaties made by the United States are the law of the land, U.S. Const. art. VI, but if not implemented

non-self-executing treaty is thus not generally one that the President may make unilaterally. As Judge Boudin recently pointed out, "[w]hen the President negotiates . . . a non-self-executing treaty, and when Congress refuses to adopt implementing legislation for a non-self-executing treaty, both are performing functions entrusted to them by the Constitution." *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (CA1 2005) (en banc).

There is very good reason to uphold this limitation on the President's power. Given the vast range of non-self-executing treaties to which the U.S. is a party, holding that the President may take legislative action to execute any of them would have radical consequences. The Senate ratified many of these treaties subject to explicit reservations that they were non-self-executing,[9] but those reservations would hardly protect the Congress's legislative prerogatives if the President could act unilaterally and with the force of law to execute a non-self-executing treaty. There is no principled difference, moreover, between allowing the President to override such an explicit reservation and allowing the President to execute unilaterally a treaty, like the Optional Protocol, that the Senate originally understood to be non-self-executing at ratification. The President's position here intrudes upon Congress's control over implementing legislation and, in the process, vastly extends the scope of his own power.

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by appropriate legislation they do not provide the basis for a private lawsuit unless they are intended to be self-executing...").

[9] See, *e.g.*, Comm. On Foreign Relations, International Covenant on Civil Rights, S. Exec. Rep. No. 102-123, at 9, 19, 23 (1994); Comm. on Foreign Relations, Covenant Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-130, at 30-31 (1992).

D. The President's Order is Contrary to the Will of Congress as Expressed in the *Habeas* Statute.

This case involves federal intervention in state criminal proceedings to secure federal rights. This is not, to put it mildly, unexplored territory. Rather, such intervention has been the subject of extensive Congressional regulation since 1867 under the *habeas corpus* statute. See Act of Feb. 5, 1867, 14 Stat. 385 (extending federal *habeas* to cover persons in state custody). That statute and its subsequent amendments represent an intricate and carefully calibrated set of legislative compromises; likewise, judicial interpretations of that statute have carefully balanced the need to enforce federal rights with the imperative to avoid undue interference with state judicial processes. The President's action here, however, runs roughshod over these particular balances and, more broadly, over Congress's judgment that the federal *courts* are the appropriate institution to supervise state court enforcement of federal rights. By requiring the state courts to reopen a state conviction in circumstances in which the United States concedes that the *habeas* statute would forbid *federal* courts to intervene, the President's action is *contrary* to the will of Congress and thus falls within *Youngstown*'s most disfavored category of executive action.

To the extent that the Federal Government has power to interfere with state criminal proceedings, that authority derives from powers specifically vested in Congress: the power to enforce federal constitutional rights, U. S. Const., Amdt. 14, §5, to regulate the jurisdiction of the federal courts, *id.* Art. III, §1, and to regulate the writ of habeas corpus specifically under the Suspension Clause, *id.* Art. I, §9; *Ex parte Bollman & Swartwout*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F.Cas. 144 (CCD Md. 1861). Congress has exercised that power by drafting statutes to govern the granting of writs of *habeas corpus* to prisoners in

custody because of a state-court judgment. Congress comprehensively reassessed the question of federal intervention in state criminal proceedings in the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. The AEDPA amended the federal *habeas* statute to set out detailed and strict conditions for when a federal court may intervene to reopen state criminal proceedings.

Four specific aspects of the statutory *habeas* regime are most relevant here. First, Section 2254(b)(1) requires the petitioner to exhaust state remedies. The doctrine of procedural default, barring a federal court from hearing a claim that was not properly raised before the state courts and can no longer be raised there, simply enforces the exhaustion requirement. By seeking to override Texas's own rules of procedural default barring state collateral review of Medellin's claim, the President attacks rules with which Congress not only chose not to interfere, but which Congress and the federal courts also built into the federal *habeas* regime.

Second, Section 2254(d)(1) forbids federal *habeas* relief unless the state court's judgment was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This provision designates this Court, not the President, as the primary guarantor of federal rights in state criminal proceedings. Moreover, this Court has plainly held that the Vienna Convention does not require state courts to set aside their rules of procedural default. See *Sanchez-Llamas*, 126 S.Ct., at 2682-2688. The President's action here thus interferes with Congress's commitment of authority to this court to construe the federal rules binding on state courts.

Third, Section 2254(e)(2) restricts the ability of a federal court to hold an evidentiary hearing on a federal claim when the federal petitioner has not developed the factual basis for his claim in state court. The *Breard* Court cited this provision

as trumping any claim that the Vienna Convention requires federal courts to set aside ordinary rules of procedural default and allow presentation of treaty claims outside the ordinary *habeas* rules. See *Breard*, 523 U.S., at 376.

Fourth, the AEDPA sharply limits the extent to which federal *habeas* courts can consider treaty claims like Medellin's. Federal rights under treaties fall within the initial *habeas* jurisdiction of the district courts, but a district court ruling is available only if a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(1). Such an certificate may issue, moreover, "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). When Medellin's case was previously before this Court, the United States argued that this plain language excluded appeals from the denial of relief on grounds arising from a treaty. Brief of United States as *Amicus Curiae* in Support of Respondent in No. 04-5928, *Medellin* v. *Dretke*, at 13-15 (Feb. 2005). The point, of course, is not that this provision bars review in the present posture but rather that Congress has carefully limited the extent to which federal courts can reopen a state conviction on treaty grounds. The President's Memorandum runs contrary to that limitation.

These specific provisions simply emphasize what the whole history of *habeas corpus* in this country shows: Congress has pervasively regulated the scope and limits of federal interference with state court convictions. The President's Memorandum undertakes to reopen a state conviction in circumstances under which a federal court would plainly lack power to act. The fact that Congress has never anticipated such executive interference—and hence never sought to forbid it explicitly—can be of little comfort to the United States. Congress has made clear that the federal courts are its chosen instrument for supervising the state judiciaries, and the President is no more entitled to usurp that role than he is

to cast aside the specific limitations that Congress has placed on its exercise

Nor can Congress's ratification of the Vienna Convention in 1969 give the stamp of congressional approval to the President's action. The Supreme Court has made clear that a Vienna Convention claim, like all claims based on federal law, is subject to the restrictions imposed by the AEDPA:

> "[A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. . . The Vienna Convention . . . has continuously been in effect since 1969. But in 1996, . . . Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). . . . Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be."

Breard, 523 U.S., at 376. Medellin's Vienna Convention claim, too, is subject to the AEDPA limitations, which he cannot overcome. The President's Memorandum, if read as an order, attempts an end-run around those AEDPA restrictions, and so puts the President into conflict with the will of Congress.

Because the President's Memorandum is contrary to the will of Congress, a mandatory reading of that Memorandum describes an order that falls into *Youngstown's* third category, where the President's power is at its "lowest ebb" and his claims of wide authority "must be scrutinized with caution." *Youngstown*, 343 U.S., at 637-638 (Jackson, J. concurring). The United States can cite to no Supreme Court decision upholding presidential action under these circumstances. Cf., *e.g.*, *Dames & Moore*, 453 U.S., at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

II. THE PRESIDENT'S ORDER UNCONSTITUTIONALLY INTERFERES WITH THE INDEPENDENCE OF STATE COURTS.

The President's Memorandum not only exceeds the bounds of Executive authority vis-á-vis Congress, it also contravenes fundamental principles of judicial independence and federalism. Although historical practice establishes a limited Presidential authority to stay or resolve claims pending in domestic courts as an adjunct to his authority to recognize foreign governments, *see supra* Part I, we are aware of no prior instance in which the President has sought to compel state courts to exercise jurisdiction they do not have, mandate a particular resolution of a key issue in a particular set of cases, or reopen final judgments. And we can see no principled reason why, if the President can do these things to the state courts, he may not exert similar powers over Article III tribunals.

A. The President May Not Require State Courts to Exercise Jurisdiction That They Do Not Possess Under State Law.

In *Testa* v. *Katt*, 330 U.S. 386 (1947), this Court held that the state courts ordinarily may not decline to hear federal causes of action, even if those causes of action run contrary to state policy. The Court was careful to note, however, that the state court enjoyed "jurisdiction adequate and appropriate under established local law to adjudicate this action." *Id.*, at 394. Other cases in this vein, both before and after *Testa*, have likewise qualified the state courts' obligations to enforce federal law by noting that the federal claim did not fall outside the state court's preexisting jurisdiction.[10] As the

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[10] See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 369 (1990) (noting that "a state court may not deny a federal right, *when the parties and controversy are properly before* it, in the absence of a 'valid excuse'") (emphasis added); *Mondou* v. *New York, New Haven & Hartford R.R. Co.*, 223 U.S.

Court made clear in *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990), "[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."[11]

Henry Hart's observation a half-century ago continues to state the norm in our federal system: "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954).[12] There are two exceptions to this principle that may require a state court to apply federal *procedures* when hearing a federal claim. It is not at all clear that either exception could warrant an extension of state *jurisdiction* not authorized by state law. In any event, neither exception applies to this case.

1, 56 (1912) (holding that rights under the Federal Employer's Liability Act were enforceable in state court, but noting that Congress had not attempted "to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure"); *Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876) (holding that federal rights of action are enforceable in state court, so long as the state court is "competent to decide rights of the like character and class"); see also *Alden* v. *Maine*, 527 U.S. 706, 752 (1999) (describing *Testa*'s holding as applying to "state courts of 'adequate and appropriate' jurisdiction").

[11] See also *Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U.S. 211, 222 (1916) (rejecting the idea that the state court's duty to enforce federal law "depended upon the conception that for the purpose of enforcing the [federal] right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States"); see generally Bellia, Federal Regulation of State Court Procedures, 110 Yale L. J. 947, 970-92 (2001).

[12] See *Johnson* v. *Fankell*, 520 U.S. 911, 919 (1997) (relying upon Professor Hart's observation); *Howlett*, 496 U.S., at 372 (same).

The first exception holds that a state court must apply federal procedures that are "part and parcel of the remedy afforded" under federal law. *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 362 (1952) (quoting *Bailey* v. *Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943)). The right to be excused from procedural default, however, is hardly part and parcel of Medellin's federal treaty rights. Indeed, this Court has held—with the concurrence of the United States—that the Vienna Convention does not supersede procedural default rules. *Sanchez-Llamas*, 126 S.Ct., at 2669. And it is clear that such rules would block Medellin's claim if it were brought in federal court. Medellin's federal rights under the treaty were fully satisfied by the opportunity to raise those rights at trial.

The second exception is that particular state procedures may be preempted if they unduly burden particular federal rights. In *Felder* v. *Casey*, 487 U.S. 131 (1988), this Court held a state notice-of-claim statute for suits against state or local officials to be preempted as to federal suits under 42 U.S.C. §1983 (1996). But *Felder* made clear that its holding did not abrogate the general rule that state courts may decline to hear federal claims on the basis of neutral and generally applicable rules of procedure. See 487 U.S., at 141-142.[13]

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[13] The Court explained:

> "Nor is this condition a neutral and uniformly applicable rule of procedure; rather, it is a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority. Second, the notice provision discriminates against the federal right. While the State affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right."

Id. This Court emphasized that discrimination was key to *Felder*'s holding in *Johnson*, 520 U.S., at 918, n.9. It was also crucial in *Felder* that the state rule in question would not apply if the 1983 claim had been brought

There is no serious argument that the state's procedural default rule is in conflict with federal policy here: it mirrors the federal rule, the U.S. has taken the position that it legitimately applies, and in fact the U.S. has acted to protect such rules for all future cases by withdrawing from the ICJ protocol.

This well-established line of cases suggests that an attempt by *Congress* to require the state courts to disregard neutral and generally applicable restrictions on their jurisdiction would raise serious constitutional questions. But the President's power is even narrower than Congress's. After all, the Executive ordinarily may not even bring suit in a court that already has jurisdiction without Congressional authorization. See *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888). There is no precedent for executive authority to commandeer the state courts and require them to exercise jurisdiction that they do not otherwise possess.

B. The President May Not Direct the State Courts to Decide a Particular Issue in a Particular Case in a Particular Way.

The availability of review is a crucial issue in every collateral attack upon a prior judgment of conviction. State courts decide this question by applying their own rules of procedural default and any other constraints on collateral attack under state law. The President's memorandum, however, reaches into a narrow set of particular cases—those involving the *Avena* prisoners—and directs the state courts to resolve any questions concerning the availability of review of those prisoners' Vienna Convention claims in favor of

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in federal court. See 487 U.S., at 141. Here, of course, the federal courts apply an identical procedural default rule, which the President has not sought to disturb.

review.[14] This dramatic and unprecedented intrusion on judicial independence violates this Court's stricture that even Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

The reach of *Klein* is notoriously ambiguous, but this Court stated the key limiting principle in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). *Robertson* upheld a statute providing that particular actions by the Bureau of Land Management, which had been challenged in pending litigation specifically mentioned in the statute, satisfied the relevant statutory requirements. The key point, the Court said, was that the new statute "compelled changes in law, not findings or results under old law." *Id.*, at 438. The President's memorandum, on the other hand, does not purport to change the underlying law in any way.

This case is substantially easier than *Klein* or *Robertson* in at least three respects. First, the directive to the courts in this case is not contained in a statute, executive order, or any other measure that even purports to be of general applicability. Second, the actor is the President rather than Congress. Unlike Congress, the President has no independent or delegated authority to change the underlying law governing these cases in the general way required by *Robertson*. Third, the President has attempted to direct a resolution of the relevant cases under *state* law, not federal law. If it were otherwise, Medellin could have sought review and reconsideration in the federal courts as well as the state courts. Instead, the state courts are obliged to construe their *own* rules governing collateral review in such a way as to

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[14] Although the President has not directed the state courts to grant a new trial, there is no reason in principle that he could not do so under the United States' theory. That would merely require directing the outcome of two issues—the availability of review plus the existence of prejudice arising from the Vienna Convention violation—rather than one.

permit review and reconsideration. But even if the national government has the authority to preempt those rules by promulgating a contrary general federal rule of decision, it has not done so here. Even this Court, of course, cannot direct the state courts to construe state law in a particular way. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

Klein and *Robertson* did turn on the integrity of the federal judicial power protected under Article III, and one might argue that the Constitution affords no similar guarantee for the integrity of the *state* judicial power. That argument would, in our view, be profoundly mistaken.[15] The Constitution conferred no explicit power upon Congress to interfere with proceedings in the state courts. Under the Madisonian Compromise, the Framers left Congress the choice whether to establish lower federal courts, and in fact Congress chose not to confer general original jurisdiction over federal questions on those courts until 1875. Under these circumstances, most federal issues were presumptively litigated in the state courts in the first instance, and the integrity of those proceedings against political branch interference would have been of no less importance than the

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[15] As this Court observed in *Alden* v. *Maine*, 527 U.S. 706, 752-753 (1999), "[i]t would be an unprecedented step . . . to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress' authority to pursue federal objectives through the state judiciaries exceeds not only its power to press other branches of the State into its service but even its control over the federal courts themselves. The conclusion would imply that Congress may in some cases act only through instrumentalities of the States." See also *Helvering* v. *Gerhardt*, 304 U.S. 405, 415 (1938) (describing "the establishment of the judicial department" as one of the "sovereign and reserved rights" rights of the States: "[w]ithout this power, and the exercise of it . . . no one of the States under the form of Government guaranteed by the Constitution could long preserve its existence") (quoting *Collector* v. *Day*, 78 U.S. (11 Wall.) 113, 126 (1970)).

integrity of proceedings in the federal district and circuit courts. Moreover, this Court has suggested that it may only review on appeal decisions that have the requisite integrity to be "judicial judgments." *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 698-699 (1927). If the state judicial power were somehow more open to political branch interference than the federal one, this Court would have had to grapple with the implications of that difference for its ability to review state court judgments in federal question cases. Finally, over 200 years of statutes and doctrine—from the Anti-Injunction Act to *Murdock* to the abstention doctrines to the statutory and common law restrictions on *habeas* review—confirm the presumptive independence of the state courts from federal interference.

The truth is that nothing in the President's action or argument here is limited to cases in the state courts. If the President's say-so that a court must set aside rules barring collateral review has the force of federal law, then that law would bind both the state and federal courts. Nor is the President's asserted authority confined to cases in which his interference benefits the party asserting a federal right. If the President felt that a court had been overly solicitous of a prisoner's claims of prejudice from a Vienna Convention violation, for example, no reason appears why he might not require "review and reconsideration" of *that* result. To take an example only slightly further afield, it is hard to see why the President might not direct particular results denying review or relief in federal court cases involving suspected terrorists. The President's argument here is sweeping indeed, and it is impossible to tell where its principle stops.

C. The President May Not Require State Courts to Reopen Final Judgments.

The President's Memorandum required the Texas courts to reopen Medellin's conviction and sentence notwithstanding that the state court's judgment had become final. It is clear,

in the Article III context, that judicial judgments cannot be made subject to executive revision, see *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), and that final judgments may not be reopened by legislative command, see *Plaut*., 514 U.S., at 225-226. As we argued in the last section, the independence of the state courts from control by the federal political branches was no less central to the Founders' design than the independence of the Article III courts. The President is thus no more entitled to revise a final state court judgment than he would be to revise the judgment of a federal court.

This Court's opinion in *Plaut* is instructive on this score. That opinion cited numerous authorities from the Founding period and the early republic for the general proposition that political-branch interference was inconsistent with the very nature of judicial power. See *id*., at 219-225. The principles discussed were not unique to Article III, and many of the references were to state judgments.[16] The Court concluded that finality is intrinsic to the very notion of judicial power of which Article III is but an instance: "'a judgment conclusively resolves the case' because 'a judicial Power is one to render dispositive judgments.'" *Id*., at 219 (quoting Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990)). All of the reasons for respecting the integrity of state judgments canvassed in the preceding section support this conclusion.

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[16] *Id*. (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) (discussing Connecticut judgments); *Lewis* v. *Webb*, 3 Greenleaf 326 (Me. 1825); *Bates* v. *Kimball*, 2 Chipman 77 (Vt. 1824); *Merrill* v. *Sherburne*, 1 N.H. 199 (1818); Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv. L. Rev. 208 (1902); 5 Laws of New Hampshire, Including Public and Private Acts, Resolves, Votes, Etc., 1784-1792 (Metcalf ed. 1916); Vermont State Papers 1779-1786, pp. 531, 533 (Slade ed. 1823); Report of the Committee of the Council of Censors 6 (Bailey ed. 1784) (Pennsylvania)).

Habeas corpus is a limited exception to the finality of judgments in criminal cases. But the existence of *habeas* review does not mean that there is no constitutional protection for finality of state judgments. *Habeas* review is considered an exercise of appellate jurisdiction, see *Ex parte Bollman*, 8 U.S. (4 Cranch), at 101; it thus falls within *Plaut*'s recognition that appellate review by another judicial tribunal does not violate the principle of finality. See 514 U.S., at 227. In Medellin's case, by contrast, *habeas* review is concededly barred, and the *President* seeks to overturn the state court's judgment that it lacks jurisdiction. This executive intervention into the judicial process offends both *Hayburn* and *Plaut*.

Recognizing executive authority to reopen state court judgments would have far-reaching consequences. It would, for example, obviate the Article II's restriction of the President's pardon power to crimes against the United States. Moreover, there is no principled reason to confine the President's assertion of authority to reopen final judgments to the state courts or to judgments of conviction, as opposed to acquittal. The fact that the President seeks to use this broad power in the present case for the relatively benign purpose of satisfying an international court's judgment should not blind this Court to the implications of an executive power to reopen state or federal judgments whenever the interests of national security require it.

III. The President's Memorandum is Best Construed as Non-Binding.

This case raises fundamental questions of constitutional structure. But these questions only arise if the President's Memorandum is construed as a mandatory order purporting to bind the state courts to disregard limitations on their jurisdiction. The Memorandum simply does not say that: Its wording is consistent with the position that the President took

in *Breard*, which is that President has power under these circumstances to request action by state authorities but not to compel. This Court should adopt that construction and avoid the fundamental constitutional questions that would otherwise arise in this case.

If the President's Memorandum is an order, it is a very odd one. It is styled as a "MEMORANDUM FOR THE ATTORNEY GENERAL," and it is directed to an officer of the federal Executive, rather than to the state courts. The operative language consists of a single sentence:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

Pet. App. 187a. This language does not *order* anyone to do anything; it creates no new legal obligations. It certainly does not purport to override Texas's rules or to confer new jurisdiction on the state courts. The text contemplates enforcement of the *Avena* decision in the same way that the Vienna Convention itself is enforced in this country: through the efforts of state and local law enforcement officials who come into contact with foreign nationals, without any federal implementing legislation creating further legal obligations. The wording of the Memorandum suggests that state courts should read the *Avena* decision and determine what "effect" it can be given, consistent with other applicable principles of state and federal law. Some state courts may determine that their *habeas* regimes permit them to grant the "review and reconsideration" directed by the ICJ; for instance, some of the *Avena* prisoners may not have defaulted their Vienna Convention claims or may still be on their first habeas petition.

Nothing in the Memorandum purports to *require* reconsideration when, as in Texas, state law limits the discretion of the state courts more strictly. Given that the United States Government has consistently argued that the application of federal and state procedural rules that may limit the right to raise Vienna Convention claims is valid and consistent with the treaty, it would be exceptionally odd to read the President's Memorandum as overriding those rules. Nothing in the Memorandum suggests that the Executive means to reverse the position it took in *Breard*, which was that the President has power under these circumstances to *request*, but not to compel. See Brief of United States in *Breard* v. *Greene*, at 51.

Any lingering doubt as to the President's meaning ought to be dispelled by his emphasis on "principles of comity"—principles which are, by definition, discretionary. See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 543, n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."). The President surely knew that no court is free, on grounds of comity, to override a clear statutory constraint on its jurisdiction.

Multiple canons of construction favor this non-mandatory reading of the Memorandum. The Court has repeatedly held that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will* v. *Mich. Dept of State Police*, 491 U.S. 58, 65 (1989)). Similar canons disfavor reading ambiguous federal enactments to preempt state law, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 448 (2005); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and mandate the "utmost caution" before construing federal law

to require a state court to hear federal claims notwithstanding "a neutral state rule regarding the administration of the courts." *Howlett*, 496 U.S., at 372. Most generally, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). This Court should exercise the same caution in construing the President's Memorandum.

Nor, finally, is the Department of Justice's interpretation of the Memorandum as mandatory entitled to deference. The Department is not construing its own rule or regulation, nor can there be any analogy to the deference ordinarily accorded an administrative agency's construction of a statute that it is charged to enforce. See *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). There is no delegation of authority to Department of Justice to enforce the Vienna Convention or the Memorandum, let alone of authority to issue binding interpretations of those measures. See *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001). Nor is the deference sometimes accorded to Executive interpretations in the realm of foreign affairs appropriate here, because the Department of Justice is not the agency that negotiated the Vienna Convention or that is charged with overseeing its implementation of the Vienna Convention. That agency, of course, is the Department of State. Courts have been especially reluctant to defer to executive agency interpretations of law when those interpretations are embodied not in a formal rule or regulation, but instead in a litigation position embodied in a brief. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) ("Of course we deny deference to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.") (quoting *Bowen*

v. *Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). That hesitance is especially appropriate here, where the DOJ's current position on whether the President has constitutional *authority* to issue a mandatory order to the state courts directly contradicts the position that it took in 1998 in the *Breard* case. Brief of United States in *Breard* v. *Greene*, at 51.

CONCLUSION

The Court should affirm the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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60 719 H

30 pgs

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(16)

No. 06-984

In The

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF EARTHRIGHTS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Amicus agrees with petitioner that state courts must honor a treaty obligation of the United States, particularly where the President has sought to enforce that obligation. Arguments raised by the United States in earlier briefing in this case, however, raise the far broader question of whether the President has inherent, unilateral authority to preempt state criminal procedure law based on perceived interference with foreign policy, regardless of any authority to do so granted by statute, treaty, or executive agreement. This question, if addressed by the Court, could have implications regarding whether the Executive has the unilateral ability to preempt any generally applicable state law, including tort law, that is seen as a barrier to foreign policy objectives.

EarthRights International (ERI) is a non-profit human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI is counsel in several transnational lawsuits asserting state-law claims that arise partly out of conduct overseas. In *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), and in *Doe v. Unocal Corp.*, No. BC 237980 (L.A. Super. Ct.), which were settled in March 2005, ERI was counsel in litigation alleging that a California corporation was liable under, *inter alia*, California state law for its complicity in forced labor, rape, and murder carried out by Burmese soldiers. In *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.) and *Bowoto v. ChevronTexaco Corp.*, No.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no party other than *amicus* and its counsel authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief.

CGC-03-417580 (S.F. Super. Ct.), ERI is counsel in litigation alleging that a California corporation is liable under, *inter alia*, California state law for its complicity in murder and other abuses by members of the Nigerian security forces.

These cases support U.S. foreign policy by seeking to ensure that U.S. corporations are not complicit in human rights violations. Nonetheless, ERI has an interest in ensuring that generally applicable state law is not improperly preempted by federal executive conduct, and in particular that state-law tort claims are not improperly dismissed for perceived interference with federal foreign affairs powers.

STATEMENT OF THE CASE

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena)*, 2004 I.C.J. 128 (Judgment of Mar. 31), the International Court of Justice held that the United States violated the rights of Petitioner and fifty other Mexican nationals under the Vienna Convention on Consular Relations. On February 28, 2005, the President "determined . . . that the United States will discharge its international obligations under [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." President's Memorandum for the Attorney General, SUBJECT: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005) [hereinafter "determination"]. In prior proceedings in this case, the United States has argued that the "presidential determination, like an executive agreement, has independent legal force and effect, and contrary state rules must give way under the Supremacy Clause." Brief for the United States as *Amicus Curiae* Supporting Respondent at 9, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); *accord id.* at

43–44; Brief for the United States as *Amicus Curiae* at 13, *Ex Parte Medellin*, 2006 Tex. Crim. App. LEXIS 2236 (Nov. 15, 2006) (No. AP-75,207). Thus, the Executive asserts the power to preempt state law where necessary to enforce the United States' international treaty obligations.[2]

Language in the Administration's prior briefing in this case, however, seems to propose a second rationale that contains no similar limitation on executive power. The government suggests that Article II grants the Executive the authority to create binding federal law that can preempt state law based solely on the Executive's foreign policy preferences, without regard to any statutory authority or international obligation. That is, the Administration has

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[2] Brief for the United States as *Amicus Curiae* at 22, *Ex Parte Medellin*, 2006 Tex. Crim. App. LEXIS 2236 (Nov. 15, 2006) (No. AP-75,207) (asserting the "authority of the President to determine the means by which the United States will implement its international legal obligations"); *id.* at 30 ("Just as the President may enter into an executive agreement to resolve a dispute with a foreign government, the President is equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government."); *accord* Brief for the United States as *Amicus Curiae* Supporting Respondent at 45, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). Likewise, petitioner argues that the Executive has the authority to enforce the United States' treaty obligations domestically because treaties are supreme under the Supremacy Clause, and that the "Take Care" clause affords the President the authority to ensure that the United States complies with existing treaty obligations. Petition for Writ of Certiorari at 21–22, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984). "If the President's authority in international affairs includes the authority to conclude new agreements without Senate approval, then surely it includes the authority to ensure that the United States complies with existing obligations to foreign nations under treaties already ratified with the advice and consent of the Senate." *Id.*

argued that "[t]he President's authority to issue his determination rests not only on his authority to determine how the United States will respond to an ICJ decision, but also on the President's authority under Article II of the Constitution to manage foreign affairs." Brief for the United States as *Amicus Curiae* Supporting Respondent at 44, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (citation omitted); *accord id.* at 42; Brief for the United States as *Amicus Curiae* at 25, *Ex Parte Medellin*, ___ S.W. ___, 2006 Tex. Crim. App. LEXIS 2236 (Nov. 15, 2006) (No. AP-75,207); *id.* at 13 (claiming determination derives power to preempt from President's "constitutionally based foreign affairs powers" as well as from treaty and statute).

The narrow question *amicus* addresses is whether the President has, as the Administration seems to suggest, the unilateral authority to preempt generally applicable state law, based not on any authority to implement the United States' international legal obligations but rather based *solely* upon his determination that application of such law in a particular case will interfere with U.S. foreign affairs. As of the time of filing, of course, *amicus* does not know whether the Administration continues to suggest this rationale at the merits stage of this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus agrees with petitioner that state courts must honor an undisputed international obligation of the United States, under a duly ratified treaty, to give effect to the *Avena* judgment in the cases that the judgment addressed. Although this is particularly true since the President has sought to enforce that treaty obligation, such obligation would bind state courts even in the absence of Presidential implementation. Respect for international law has been a

fundamental federal concern since the Founding.[3] The argument that the President may enforce a treaty obligation (which is already part of federal law) contemplates narrowly circumscribed powers that are analogous to the President's power, previously recognized by this Court, to preempt state law through certain kinds of executive agreements. But the Court should neither consider nor adopt any extension of the President's preemptive power beyond this limited circumstance.

I. According to the Administration, two treaties and various statutes afford the President the authority to preempt state law in this case. Although the Administration has also suggested that executive authority to "manage foreign affairs" allows the President to unilaterally preempt state law, the Court should not reach the merits of this alternative rationale.

The President's authority is indisputably greater when he acts to enforce treaties or pursuant to statutes than when he acts independently of any such authorization, since the latter circumstance involves no congressional acquiescence. Accordingly, if the existence of these international treaty obligations and statutes is insufficient to afford the President the power to preempt, then the President cannot claim to derive such power from some amorphous, unilateral foreign

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[3] *See* U.S. Const. art. I, § 8 (granting Congress the power to define and punish offenses against the laws of nations); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–19 (2004) (detailing Framers' concern for international law); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l. L. 461, 484–88, 493 (1989) (noting that the Framers enacted the Alien Tort Statute to discharge the new nation's legal and moral duty to comply with international law.)

affairs authority. If, on the other hand (as *amicus* believes is the case), treaties or statutes provide a basis for preempting state law, there is likewise no occasion to consider whether any other basis for preemption exists.

II. Nonetheless, should the Court reach beyond the question of whether executive authority includes the power to require domestic law compliance with international law obligations or whether preemptive authority has been delegated by statute, it should conclude that the President does not have the unilateral power to enforce his foreign policy preferences or opinions as a matter of domestic law. The foreign affairs doctrine is a doctrine of preemption of state action by federal law. In this case, the only state action at issue is the application of ordinary criminal procedure rules. Facially neutral state law rules may not be preempted under any notion of "field preemption" in the foreign policy arena, because the state has not engaged in its own foreign policy with any direct effects on foreign relations. Moreover, because such rules fall within the traditional competence of the states, they cannot be preempted without a showing of a clear conflict with a federal statute or other federal action with the force of law.

The Executive lacks the authority to veto the application of state law rules or the adjudication of cases under state law simply because it believes they would somehow affect foreign relations. A Presidential conclusion that application of a state rule affects foreign policy is not, in and of itself, fit to preempt state law because it is not federal law. The mere existence of a Presidential policy does not confer upon the Executive the power to create preemptive law whenever foreign relations are involved. This Court has never afforded the Executive Branch such an unlimited power to unilaterally transform its policy preferences into preemptive law, nor has any of its foreign affairs preemption decisions

ever placed so much traditional state authority on such tenuous footing.

Instead, this Court has struck a delicate balance between state and federal prerogatives in existing foreign affairs preemption jurisprudence. Any suggestion that the Executive can preempt state law, based on general foreign affairs authority (rather than on authority delegated by statute or on executive authority to enforce international agreements or international law), would upset that delicate balance. Indeed, if the Executive could displace neutral state criminal procedure law based solely on a perceived effect on foreign relations, it is difficult to discern any principled limitation on its ability to do likewise regarding any case or statute the President believes impedes foreign relations. State tort, contract, tax, or any other state law, could all be preempted at the President's sole discretion, without any indication that Congress so intended. This Court should not recognize such an unchecked executive power to create domestic law solely at the discretion of the President.

Critically, the Court need not accept the Executive's broad "authority . . . to manage foreign affairs" rationale in order to find for the petitioner. Indeed, neither the Administration nor the petitioner has, in existing briefing, focused its arguments on this theory. The fact that the President lacks the authority to preempt state law based solely on his perception that it will impact U.S. foreign relations does not alter the fact that state courts must honor the United States' legal obligations. Accordingly, petitioner should prevail in this case.

ARGUMENT

I. THE SCOPE OF EXECUTIVE AUTHORITY TO PREEMPT STATE LAW IN THE ABSENCE OF A TREATY OR STATUTE IS NOT PRESENTED IN THIS CASE.

The Administration and petitioner argue that the Executive has the authority to preempt state law based in part upon two treaties — the Optional Protocol to the Vienna Convention and the U.N. Charter — as well as various statutes. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 10–13, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984); Petition for Writ of Certiorari at 20–22, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984). Accordingly, this case presents the question of executive authority to enforce an international law obligation as a matter of domestic law or the exercise of statutory authority.[4] Yet the government has also suggested that it has the far broader authority to preempt state law based solely upon Presidential foreign affairs preferences. There is no reason for this Court to consider whether the Executive has that power.

Whatever the scope of executive power to preempt state law on foreign affairs grounds, that power is undoubtedly greater when the President seeks to enforce a treaty or is delegated authority under a statute than when no such treaty or statute is involved. Certainly, there can be no

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[4] The Court need not even reach that question if it holds, as *amicus* submits that it should, that the *Avena* judgment binds state courts independent of any presidential determination. *See* Petition for Writ of Certiorari at 26, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984).

argument that the Executive has *less* power in the former circumstance. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."); *Reid v. Covert*, 354 U.S. 1, 17 n.33 (1957) ("[I]t cannot be contended that [] an [executive] agreement rises to greater stature than a treaty."). Thus, the power to enforce a treaty or other international agreement is of necessity greater than any general foreign affairs authority standing alone.

There is no dispute that the United States has an international treaty obligation to comply with *Avena*. *See* Petition for Writ of Certiorari at 25–26, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984). Petitioner should therefore prevail, without any reference to general foreign affairs authority, because the Executive can preempt state law in enforcing a treaty. But, if the Executive acting pursuant to its power to enforce that treaty obligation could not preempt state law, the Executive could not do so based solely upon any general foreign relations authority. Either way, there is no reason for this Court to consider whether a Presidential determination based solely on foreign policy preferences has the power to preempt state law.

This Court, of course, has a general policy to avoid deciding significant constitutional questions unnecessarily, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), and "never to formulate a rule of constitutional law broader than is required by the precise facts

to which it is to be applied," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 192 (2003) (internal quotation marks omitted). Accordingly, the Court should confine its analysis to the question of the Executive's authority to preempt state law in the specific circumstance of enforcing an international judgment rendered pursuant to a treaty of the United States, and its decision should make clear that no other question has been resolved.

II. RECOGNIZING UNILATERAL EXECUTIVE AUTHORITY TO PREEMPT STATE LAW, OUTSIDE THE CONTEXT OF THE ENFORCEMENT OF A TREATY AND WITHOUT STATUTORY DELEGATION, WOULD RAISE SUBSTANTIAL CONSTITUTIONAL CONCERNS.

The "foreign affairs" doctrine, first articulated in *Zschernig v. Miller*, 389 U.S. 429 (1968), preempts, in limited circumstances, state action that interferes with federal foreign policy prerogatives. Foreign affairs preemption is rare. In prior foreign affairs preemption cases, the action complained of has either been state judicial action that directly implicates foreign relations,[5] or the enactment of a statute or other policy that facially affects foreign affairs.[6]

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[5] *See Zschernig*, 389 U.S. at 440 (state courts engaging in "judicial criticism" of foreign regimes); *N.Y. Times Co. v. N.Y. Comm'n on Human Rights*, 361 N.E.2d 963, 968 (N.Y. 1977) (quasi-judicial city agency engaging in "inquiries into the righteousness of foreign law").

[6] *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 408–12 (2003) (California statute concerning insurance claims by Holocaust victims); *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1016, 1030 (9th Cir. 2003) (California statute allowing claims for WWII-era forced labor);

The doctrine actually encompasses two distinct forms of preemption. Conflict preemption considers whether state law interferes with an affirmative federal foreign policy. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–19 (2003) [hereinafter "*Garamendi*"]. Dormant foreign affairs review, or field preemption, considers whether state law intrudes upon federal prerogatives in the field of foreign policy, even in the absence of any affirmative federal activity or any conflict with such activity. *Id.*

In *Garamendi*, this Court considered whether unilateral executive action could preempt state law, and applied a form of conflict preemption. *Id.* at 419–20. *Garamendi* also noted that the decision in *Zschernig* represents a doctrine of field preemption in the field of foreign affairs. 539 U.S. at 418. If this Court were to consider whether the Executive determination at issue here has the power to preempt independent of any treaty or statute-based authority, *Garamendi* sets forth the applicable standards.

Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 45 (1st Cir. 1999) [hereinafter *Natsios*], *aff'd on other grounds by Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (Massachusetts statute targeting companies doing business in Burma); *Miami [illegible] v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1180–8[illegible] 000) (ordinance targeting companies doing business in Cuba); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (state university policy targeting Iranians); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307-8 (Ill. 1986) (tax provision targeting South African coins).

A. Generally applicable state law rules must be evaluated under *Garamendi* "conflict preemption" analysis; field preemption analysis is inapposite.

The Executive's claim that the Presidential determination has independent legal force "and contrary state rules must give way under the Supremacy Clause" is a conflict preemption argument. *See* Brief for the United States as *Amicus Curiae* Supporting Respondent at 9, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). There can be no argument that dormant foreign affairs review should apply here.

"Field preemption" is limited to situations in which a state "establish[es] its own foreign policy," *Zschernig*, 389 U.S. at 441, and is therefore inappropriate for generally applicable state law rules that have only indirect effects on foreign affairs.[7] Here, Texas has not created its own foreign

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[7] In applying Oregon's reciprocal inheritance statute, Oregon probate courts were inquiring into whether foreign regimes would confiscate property, and whether diplomatic statements were credible. *Id.* at 435. Because the law, as the Oregon courts applied it, made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own," and thus had a "direct impact upon foreign relations," *id.* at 440–41, it had to yield before the federal government's power to conduct foreign policy. But in an earlier case, this Court upheld a similar law against a foreign affairs challenge, holding that although the law would have "some incidental or indirect effect in foreign countries," the same would be "true of many state laws which none would claim cross the forbidden line." *Clark v. Allen*, 331 U.S. 503, 517 (1947). Thus, state laws whose transnational effects apply "without respect to whether the [relevant] country might be considered friend or foe" are not preempted. *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3d Cir. 1990); *accord In re "Agent Orange" Product Liab. Litig.*, 373 F. Supp. 2d 7, 81 (S.D.N.Y. 2005) (ordinary application

policy; the generally applicable procedural default rule in question is not directed at issues concerning foreign affairs, let alone at a particular foreign country. *Zschernig* field preemption does not apply.

Field preemption is also inapplicable here because the state law here falls within an area of "traditional competence" for state regulation. *Garamendi*, 539 U.S. at 420 n.11. Actions within the "traditional competence" of a state — including the creation of neutral criminal procedure rules or ordinary tort causes of action — can be preempted only upon

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of state tort law poses no risks of impermissible interference in foreign affairs); *Mukaddam v. Permanent Mission of Saudi Arabia*, 111 F. Supp. 2d 457, 473 (S.D.N.Y. 2000) (application of statute of general application to foreign government permissible if it "does not curtail the rights of foreign citizens or attempt to structure a relationship between New York, its residents, and any other country"); *United Nuclear Corp. v. Gen. Atomic Co.*, 629 P.2d 231, 266 (N.M. 1980) (because "the causes of action involved in this case are universally accepted by American jurisdictions," the *Zschernig* doctrine "has nothing to do with this case"); *Amarel v. Connell*, 248 Cal. Rptr. 276, 281–82 (Cal. Ct. App. 1988) (*Zschernig* inapplicable to laws which are "neutral in their application"). State action can only be struck down if it has a *direct* impact on foreign relations. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (analyzing caselaw and determining that "state enactments" that ran afoul of *Zschernig* "not only used state commercial power as a tool of foreign policy, their mere existence articulated state condemnation of a foreign nation's conduct"); *Natsios*, 181 F.3d at 45 (invalidating state boycott of firms that do business in Burma); *Miami Light Project*, 97 F. Supp. 2d at 1180–81 (county's boycott of firms doing business in Cuba likely invalid); *Tayyari*, 495 F. Supp. at 1378 (invalidating state university discrimination against Iranian students, designed to express condemnation of Iran); *Springfield Rare Coin Galleries*, 503 N.E.2d at 307–8 (invalidating state tax provision that discriminated against South African coins to express disapproval of South Africa); *N.Y. Times Co.*, 361 N.E.2d at 968–69 (invalidating agency's ruling that discriminated against advertisements for employment in South Africa).

a clear conflict between the policy adopted in "[t]he exercise of the federal executive authority" and the policy adopted by the state. *Id.* at 421. Footnote eleven of *Garamendi* suggests that the *Zschernig* concept of foreign affairs field preemption should apply only where a state "simply . . . take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility"; in such a case, the degree of conflict with federal policy is immaterial, since "the Constitution entrusts foreign policy exclusively to the National Government." *Id.* at 420 n.11. In contrast, where "a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict." *Id.* (internal citations omitted).[8]

Although technically *dicta*, the dichotomy espoused in footnote eleven is in accord with the presumption that the federal government "does not intend to pre-empt areas of traditional state regulation." *FMC Corp. v. Holliday*, 498 U.S. 52, 62 (1990); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that preemption is not presumed when the federal government acts "in a field which the States have traditionally occupied"). Thus, consistent with *Garamendi*, this Court should "require a conflict" before preempting action within the "traditional competence" of the states. *Garamendi*, 539 U.S. at 420, n.11 (internal citations and punctuation omitted).

Under this rule, only conflict preemption applies in

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[8] In this footnote, the *Garamendi* Court specifically analyzed the distinction between the *Zschernig* majority, which struck down the state statute without reference to a specific conflict, and Justice Harlan's concurrence, which justified the result on a conflict with a treaty. *See Zschernig*, 389 U.S. at 462 (Harlan, J., concurring). What *Garamendi* characterized as "field preemption" was the notion that "even in absence of a treaty, a State's policy may disturb foreign relations." *Zschernig*, 389 U.S. at 441.

this case because state criminal procedure is indisputably a matter of traditional state authority.

B. Under *Garamendi* "conflict preemption," laws that fall within the core of states' traditional competence cannot be preempted unless there is an actual exercise of federal preemptive authority.

Foreign affairs conflict preemption requires two elements. First, the court must identify federal action that is "fit to preempt state law"; in *Garamendi*, this took the form of an executive agreement. 539 U.S. at 416. Second, the court must determine that there is a "clear conflict" between the "express federal policy" and the state action. *Id.* at 420.

As noted above, *amicus* submits that the treaties upon which the government relies afford the President the power to exercise federal preemptive authority. To the extent, however, that the Administration suggests that the determination would have preemptive effect based solely upon the Executive's foreign policy preferences, it is mistaken. The President's determination would not be a valid exercise of federal preemptive authority in the absence of a treaty or other international obligation, or of a statute granting the Executive such authority. A unilateral determination that a state case, rule or statute might interfere with foreign relations lacks the force of law, and therefore is not an exercise of federal executive authority that could preempt state law.

1. A statement by the executive that application of a state rule affects U.S. foreign policy is not, in and of itself, fit to preempt state law because it does not carry the force of law.

Under the Supremacy Clause, certain specific acts — the "Constitution," the "laws of the United States," and "treaties" — are the "supreme law of the land," and can therefore preempt state law. U.S. Const., art. VI, § 2. Generally applicable state law, therefore, can be preempted only pursuant to an action of the political branches carrying the force of law; federal acts that do not have the force of law cannot preempt state law. *See, e.g. S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication."); *see also Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (no authority grants Executive Branch officials "the power to invalidate state law simply by conveying the Executive's views on matters of federal policy").[9]

Garamendi, of course, did conclude that executive agreements may preempt conflicting state law, despite the fact that they are not listed in the Supremacy Clause. But such agreements are "legally binding," *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994), and have long been held to have "the full force of law." *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (citing *United*

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[9] Nothing in the majority opinion in *Garamendi* conflicts with this point from the dissent.

States v. Pink, 315 U.S. 203 (1942)). The President's power to make such agreements has "been exercised since the early years of the Republic," and, at least with respect to agreements settling claims of American nationals against foreign governments, the practice "has received congressional acquiescence throughout its history." *Garamendi*, 539 U.S. at 415. The Government's suggestion that, by invoking foreign affairs, the President has the power to preempt state law even in the absence of any international agreement or obligation is a long way from the limited preemptive power recognized in *Garamendi*.[10] Indeed, the Court considered this point so indisputable that it used it in another context as an example of a "broken circle" of logic: "[T]hat Executive agreements may displace state law, for example, and that unilateral presidential action (renunciation) may displace Executive agreements, does not produce the 'logical' conclusion that unilateral presidential action may displace state law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (citation omitted).

This Court's decision in *Barclays Bank* is instructive. There, in the analogous foreign commerce clause context, the Court rejected the contention that *amicus* briefs or letters from the Administration to a state governor had the power to preempt, because they "lack the force of law." 512 U.S. at 328–30 & n.30. The Court had no occasion to resolve the question actually at issue in this case, declining to consider "the scope of the President's power to preempt state law

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[10] Although *Garamendi* relied on statements made by sub-Cabinet officials to shed light on the policy animating the executive agreements, *see* 539 U.S. at 411, 422, its analysis does not suggest that such a statement alone may have preemptive force, or that the state statute at issue would have been preempted in the absence of an executive agreement.

pursuant to authority delegated by a statute or a ratified treaty." *Id.* at 329.

The President generally has the power to execute federal law, not to unilaterally create it. *Youngstown*, 343 U.S. at 587 ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *accord Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773–74, 165 L. Ed. 2d 723 (2006). Indeed, both *Youngstown* and *Hamdan* rejected Executive assertions of the authority to make law regarding matters specifically related to foreign relations. *Youngstown*, 343 U.S. at 583, 590 (rejecting President Truman's claim of authority to seize steel mills to support national defense, including prosecution of the Korean War); *Hamdan*, 126 S. Ct. at 2759 (rejecting procedures President established to try prisoner captured during war). To the extent the Administration suggests here that it may preempt state law based solely on Executive Branch foreign policy preferences, even in the absence of an executive agreement, a treaty obligation, or statutory authority, it seeks to radically expand *Garamendi* and effectively to amend Article II and the Supremacy Clause.

2. *Garamendi* is a limited exception to the Tenth Amendment principle that only express Congressional action can limit the historic powers of the states, and should not be extended to permit preemption by mere Executive Branch fiat.

Affording preemptive power to the Executive's foreign policy preferences, independent of executive authority to enforce a treaty or other international obligation or authority delegated by statute, would countenance an

extraordinary usurpation of state and congressional power by the Executive Branch and the courts. The Tenth Amendment protects States from undue encroachment of federal authority; states retain a "residuary and inviolable sovereignty." *New York v. United States*, 505 U.S. 144, 188 (1992); *see also United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting government argument that would place no limits on federal authority in areas where states traditionally have been sovereign).

Limits on traditional state authority typically can be created only by Congress. To infringe upon historic state powers, Congress must make its intent "unmistakably clear in the language of [a] statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990) (internal punctuation omitted). Courts may not "give the state-displacing weight of federal law to mere congressional *ambiguity*." *Id.* at 464 (emphasis in original) (quoting Laurence H. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). *Gregory* required a plain statement of intent to preempt historic state powers specifically to "avoid a potential constitutional problem." 501 U.S. at 464.

In *Barclays Bank*, this Court considered whether a state tax law was preempted by the foreign commerce clause because it purportedly interfered with the Federal Government's ability to speak with one voice in international trade. 512 U.S. at 320. The state law had engendered considerable diplomatic protest from other nations. *Id.* at 324, n.22. This Court, however, held that only Congress, not the President or the Judiciary, has the authority "to evaluate whether the national interest is best served by [] uniformity, or state autonomy." *Id.* at 328–29, 331. Indeed, the Court disavowed any competence to determine whether a state law interfered with Congress' ability to speak with the voice of the nation in foreign affairs, or whether conversely Congress

had decided to allow the state to act. 512 U.S. at 324–31. Noting that "[t]he judiciary is not vested with the power" to decide how to balance the competing concerns involved, *id.* at 328, the Court presumed that a lack of "specific indications of congressional intent to bar" state law affecting foreign commerce indicates "Congress' willingness to tolerate" such law. *Id.* at 324, 327; *accord id.* at 332 (Scalia, J., concurring) (noting that the Court's decision "requires no more than legislative inaction to establish that 'Congress implicitly has *permitted*'" state's law) (quoting *id. at* 326) (emphasis in original).

To be sure, *Barclays Bank* was based in part on the fact that "the Constitution grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 329 (quoting U.S. Const. art. I, § 8, cl. 3). But *Barclays Bank* also implicitly recognizes that, in areas other than foreign commerce, the President's preemptive foreign affairs powers derive either from a congressional grant of authority or from an executive agreement. Although the situation was not presented in *Barclays Bank*, this Court noted that, in another case, Congress might delegate preemptive authority to the President "by a statute or a ratified treaty." *Id.* at 329. In the absence of such a delegation, this Court only contemplated that the President might preempt state law "pursuant to a legally binding executive agreement." *Id.* The Court specifically declined to consider when such unilateral executive action might preempt state law precisely because the only Executive Branch communications at issue in *Barclays Bank* were those "that express federal policy but lack the force of law." *Id.* at 330. A Presidential directive, such as the determination at issue here, cannot carry the force of law simply because the President declares that it does. The only mechanism even contemplated by *Barclays Bank* through which the Executive might preempt traditional state authority

without congressional action is an executive agreement. *Barclays Bank* would be nullified if the Executive could preempt state law based on some general foreign affairs authority.[11]

Garamendi can be seen as an exception to the rule requiring explicit congressional direction to override historic state powers, since the Court noted that a clear conflict with the policy reflected in the executive agreement is "alone enough" to require preemption of state law. 539 U.S. at 425. Given, however, the Tenth Amendment concerns at stake, this Court should reject any argument seeking unprecedented expansion of *Garamendi* to permit preemption by mere memorandum of the President, in the absence of any finding that such authority has been conferred on the President through a particular treaty, other international obligation or statute.

Under *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985), state sovereignty is usually protected against federal intrusion by states' representation in the federal political process. Allowing federal courts to override historic state powers without explicit congressional direction "would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464 (quoting Tribe *supra*, § 6-25 at 480). These concerns counsel strongly against expansion of *Garamendi* to permit preemption based solely on Presidential policy preferences, for two reasons.

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[11] Indeed, since international trade policy is a facet of U.S. foreign policy, affording the President general foreign affairs preemptive power might allow the President unilaterally to regulate international commerce through preemption of state rules, in violation of the foreign commerce clause, by simply declaring that such action was taken pursuant to his authority to "manage foreign affairs."

First, the requirement that the President must take the public, high-profile step of negotiating and signing an executive agreement — or equivalent action with the force of law — affords a measure of political protections to states. Those protections would be eviscerated if the President can preempt state law by simply determining that its application would affect foreign policy. Second, "the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1693 (1997). In contrast, "the erroneous federalization of [state] law . . . will not trigger the political branches' special means to monitor and control adverse foreign relations activity." *Id.* at 1694. Thus, if a state goes too far in intruding upon foreign relations, the political branches can protect themselves; if this Court goes too far in preempting state law, states are largely helpless.[12]

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[12] Tenth Amendment concerns do not apply to the argument that the President's determination has preemptive effect pursuant to treaty-based authority. *See Reid*, 354 U.S. at 18 ("To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."); *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that, in determining whether treaty and statute improperly interfere with states' rights, "it is not enough to refer to the Tenth Amendment . . . because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States . . . are declared the supreme law of the land."); Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. d (1987) (Tenth Amendment does not limit the power to make treaties).

CONCLUSION

For the foregoing reasons, *amicus* urges that the issue of Presidential authority to preempt state law independent of the enforcement of a treaty or of a statutory grant is not presented and need not be reached in this case. If this Court were to reach that issue, it should conclude that the President lacks the unilateral authority to create federal law with preemptive power over generally applicable state law rules by simply determining that state law impedes foreign relations, and should reiterate that such state law can only be preempted upon a showing of an actual conflict with federal law that has preemptive force. Nonetheless, the state court was required to uphold the clear treaty obligation of the United States. Accordingly, petitioner should prevail.

DATED: June 28, 2007

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No. 06-984

Supreme Court, U.S.
FILED
AUG 23 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF *AMICUS CURIAE* OF FORMER SENIOR OFFICIALS OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF RESPONDENT

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August 2007

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INTEREST OF *AMICI CURIAE*

Amicus the Honorable Edwin Meese III served as the 75th Attorney General of the United States and is now the Ronald Reagan Distinguished Fellow in Public Policy and Chairman of the Center for Legal and Judicial Studies at the Heritage Foundation. *Amicus* the Honorable Dick Thornburgh served as the 76th Attorney General of the United States and as Under-Secretary-General of the United Nations. He had previously served two terms as Governor of the Commonwealth of Pennsylvania and currently serves as counsel to Kirkpatrick & Lockhart Preston Gates Ellis LLP. *Amicus* the Honorable Charles Fried is former Solicitor General of the United States and former Associate Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts. He is now Beneficial Professor of Law at Harvard Law School. *Amicus* the Honorable Timothy Flanigan is former Assistant Attorney General for the Office of Legal Counsel and former Deputy White House Counsel. *Amicus* the Honorable Douglas W. Kmiec is former Assistant Attorney General for the Office of Legal Counsel and former Dean, The Catholic University of America School of Law. He is now Chair and Professor of Constitutional Law at Pepperdine University. *Amicus* the Honorable Charles J. Cooper is former Assistant Attorney General for the Office of Legal Counsel and is also counsel of record for *amici* here.[1] Although *amici* are strong advocates for a robust vision of presidential power in foreign affairs, *amici* do not believe that the positions taken in this case by Petitioner and *amicus* United States

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[1] Counsel for *amici* authored this brief. No person other than counsel or *amici* made a monetary contribution to its preparation or submission. S.Ct. Rule 37.6. All parties have consented to the filing of this brief.

can be reconciled with the separation of powers and the principles of federalism embodied in the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is controlled by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), and *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*), in which the Court held that claims to consular access under Article 36 of the Vienna Convention are subject to the same procedural default rules applicable to other federal statutory and constitutional rights guaranteed to a criminal defendant. Petitioner Medellin asserts rights of consular access under Article 36 as interpreted by the International Court of Justice ("ICJ") in *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 1 (Mar. 31) – the very decision that this Court rejected in *Sanchez-Llamas*.

Medellin insists that there is no conflict between *Avena* and *Sanchez-Llamas* because he was one of the 51 particular Mexican nationals whose cases were before the ICJ in *Avena*. Medellin thus invokes *Avena* not as an authoritative precedent that this Court is bound to follow in applying Article 36, but rather as *res judicata* – a final judgment by the ICJ in Medellin's own case that, supposedly, binds this Court on a matter of United States law. With respect to Medellin, we are told, the ICJ has already determined his rights under Article 36, and in that respect this Court is subordinate to the ICJ and not the "one supreme Court" described in Article III of the Constitution.

The Solicitor General argues that the ICJ's *Avena* decision misreads Article 36, but nonetheless asserts that the President, under his Article II foreign-relations power and the relevant treaties, has authority to preempt state law and to order the Texas Court of Criminal Appeals to ignore this Court's construction of Article 36 in *Breard* and *Sanchez-Llamas*, and instead to give effect to the *Avena*

decision that this Court repudiated. Application of the analytical framework set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) ("*The Steel Seizure Case*"), makes clear that the President has no such authority, for the President's power is at low ebb when he acts in conflict with a congressionally enacted law. Here, the Article I branch, in the form of the Senate, has ratified a treaty and thereby enacted the supreme law of the land for the President to enforce: the Vienna Convention and its requirement that consular rights be implemented "in conformity with" the law of the forum state. And this Court, the head of the Article III branch, has given that law an authoritative construction contrary to the President's reading. Thus, the President here acts in contravention of the very treaty he invokes.

The Solicitor General's contention that the President may preempt Texas laws of criminal procedure by exercise of the foreign-affairs power inherent in Article II is likewise unavailing. Whatever the extent of that power, it does not extend to overriding this Court's interpretation of a treaty, nor to unilateral presidential preemption of state law.

The Solicitor General also invokes the President's power to resolve international reparations claims involving foreign sovereigns. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). But there is nothing remotely like that here. This is not a case of an individual claimant in Texas reaching overseas in an attempt to apply Texas law to a foreign government or foreign corporation for alleged torts that occurred in a foreign land. This case involves a Texas criminal court applying Texas criminal procedures to Texas judicial proceedings governing a Texas prosecution

of a foreign national who committed heinous criminal acts in Texas against Texas residents. Thus, here Texas acts within the irreducible core of State sovereignty: the criminal law. Nothing in this Court's precedents cedes to the President power to displace state law – especially not state laws that are expressly preserved by a treaty ratified by the United States Senate, in which each sovereign State is assured equal and perpetual representation.

The Solicitor General's remaining arguments amount to little more than an appeal to "efficiency" of the sort that this Court has consistently rejected. Neither federalism nor the separation of powers was instituted with the idea that it would promote governmental efficiency. Those principles are instead bulwarks against tyranny.

ARGUMENT

I. PETITIONER CANNOT ESCAPE THE CONTROLLING AUTHORITY OF *SANCHEZ-LLAMAS*.

Petitioner Medellin asserts rights of consular access under Article 36 of the Vienna Convention, contending that when the United States ratified the Convention's Optional Protocol, it agreed to submit disputes arising out of the Convention to the ICJ, and that when it ratified the United Nations Charter ("U.N. Charter"), the United States agreed to comply with any ICJ decision to which it was a party. Pet. Br. 19-20.[2] In *Avena*, the ICJ interpreted Article 36 to preempt state rules of criminal procedure under which criminal defendants such as Medellin forfeit rights if they fail to assert them during trial and appeal.

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[2] The brief for Petitioner Medellin will be cited as "Pet. Br." The brief of *amicus curiae* United States will be cited "U.S. Br."

Pet. Br. 8-9. Mexico brought the *Avena* action to obtain enforcement of Article 36 with respect to 51 Mexican nationals who had been sentenced to death by state courts, including Medellin himself, who confessed to raping and then murdering two teenage girls in Texas. Petitioner contends that the Texas court below, and this Court, too, are bound by *Avena* because the treaties listed above are the supreme federal law of the land under the Supremacy Clause of Article VI of the Constitution. Pet. Br. 21, 23-28.

Petitioner's argument runs headlong into *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), where this Court expressly repudiated *Avena*'s interpretation of those treaty requirements. The Court ruled that the question whether Article 36 requires preemption of state procedural default rules "is controlled by our decision in *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*)." 126 S. Ct. at 2682. The background rule of international law – which neither Petitioner nor the United States disputes – is that, "'absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.'" *Id.* at 2682-83 (quoting *Breard*, 523 U.S. at 375). Neither Petitioner nor the United States has identified any such express statement in any of the treaties here. Indeed, Article 36 expressly provides precisely the opposite: the rights it confers "'shall be exercised in conformity with the laws and regulations of the receiving State.'" *Sanchez-Llamas*, 126 S. Ct. at 2685 (quoting the treaty). Thus, by the explicit terms of the treaty that Petitioner invokes, state procedural default rules continue to govern. *See id.* at 2680, 2685; *Breard*, 523 U.S. at 375.

Medellin recognizes that *Sanchez-Llamas*, decided just a year ago, is a profound embarrassment for his

argument. Pet. Br. 21-22. Petitioner therefore contends that this Court's rejection of *Avena*'s reading of the treaties is irrelevant because, "[u]nlike the petitioners in *Sanchez-Llamas*, Medellin is a national of Mexico whose case was specifically adjudicated in *Avena*, and the United States is indisputably bound 'in respect of [his] particular case.'" Pet. Br. 22. Thus, according to Petitioner, the "issue is not the effect of the ICJ's *interpretation* as a *precedent*, but the effect of the ICJ's *decision* as a *judgment*." *Id.* (original emphasis). Despite the fact that this Court rejected *Avena* in *Sanchez-Llamas*, *Avena* supposedly governs Medellin's case because *Avena* is "a valid final judgment that is binding on the United States by treaty." *Id.* Petitioner contends, therefore, that his treaty rights have been authoritatively adjudicated by the ICJ, that they are *res judicata*, and that the final judgment of the ICJ is not subject to question in this Court. *Id.* Even though this Court rejected *Avena*'s reasoning and conclusion, it must nevertheless enforce the *Avena* judgment in favor of Medellin, because the ICJ's decision on this question of United States federal law is binding on this Court.

Petitioner's argument works only if the ICJ is a tribunal superior to this Court on matters of federal law, and we know that is not so. As Justice Jackson memorably remarked in an earlier *habeas corpus* case, "[t]here is no doubt that if there were a super-Supreme Court, a substantial portion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Only a "super-Supreme Court" could reverse this Court's authoritative construction of Article 36 in *Sanchez-Llamas* and *Breard*, and neither the ICJ nor any other tribunal qualifies for that role. In fact, the Court appears to have

anticipated (and dismissed) Medellin's argument in *Sanchez-Llamas*:

> Under our Constitution, "the judicial Power of the United States" is "vested in one supreme Court" . . . Art. III, § 1. That "judicial Power . . . extends to . . . Treaties." . . . If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution.

126 S. Ct. at 2684 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ." *Id.* And "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." *Id.*

The Senate and the President cannot, by treaty, rewrite Article III to subordinate this Court to an international tribunal convened by the U.N. *See Clinton v. New York*, 524 U.S. 417, 445-46 (1998) ("Congress cannot alter the procedures set out in Art. I, § 7 without amending the Constitution."). But the Court need not address this constitutional issue because it is clear that the treaties Petitioner invokes did not intend to subordinate this Court to the ICJ. As this Court observed in *Sanchez-Llamas*, the treaties neither envision nor provide judicial remedies for violation of consular rights. *See* 126 S. Ct. at 2680. Neither party here – not Petitioner nor the State of Texas – was a party in *Avena*. Indeed, the ICJ only "arbitrate[s] particular disputes between national governments," and enforcement

is exclusively by diplomatic means such as "referral to the Security Counsel." *Id.* at 2684-85. Thus the treaty contemplates exclusively and "quintessentially *international* remedies." *Id.* at 2685 (original emphasis).

Petitioner asks this Court to order the Court of Criminal Appeals of Texas "to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed." Pet. Br. i. But this Court has already held that those treaties impose *no such obligation*: "procedural rules of domestic law generally govern the implementation of an international treaty," and "Article 36 makes clear that the rights it provides 'shall be exercised *in conformity with* the laws'" of the forum State. *Sanchez-Llamas*, 126 S. Ct. at 2685 (emphasis added). "[T]his means that the [Texas] rule of procedural default – which applies even to claimed violations of our Constitution – applies also to the Vienna Convention claims." *Id.*

Although the ICJ's "decisions" have "'no binding force except between the parties and in respect of that particular case,'" *id.* at 2684 (quoting the treaty; emphasis deleted), the same is *not* true of this Court's decisions. In *Sanchez-Llamas*, the Court did not announce a rule for that case alone.

II. THE PRESIDENT'S ASSERTION OF POWER TO PREEMPT STATE PROCEDURAL LAW IN DEFIANCE OF THE EXPRESS TERMS OF THE VIENNA CONVENTION VIOLATES THE SEPARATION OF POWERS.

The argument of *amicus curiae* United States likewise seeks to evade *Sanchez-Llamas* by focusing just on the

"cases filed by the 51 Mexican nationals addressed in that decision." U.S. Br. 3. The Solicitor General agrees that *Avena* misinterpreted the obligations of the United States under the treaty (*id.* at 27-29), but states that the President has nevertheless chosen, for diplomatic reasons, to comply with *Avena* "by having State courts give effect to the decision in accordance with general principles of comity." *Id.* at 3. The President's order directing State courts to ignore controlling decisions of this Court is an exercise, according to the Solicitor General, of the President's foreign-affairs power to decide how the nation will comply with treaty obligations. U.S. Br. 8-9, 10-11. The Solicitor General offers several different theories for the President's supposed judicial authority, but none of them has merit.

A. The President Has No Treaty-Based Power To Countermand Treaty Interpretations By This Court And To Preempt State Law.

The Solicitor General first asserts presidential power to preempt state law pursuant to treaty, and observes that, although this Court "has not specifically addressed how to assess presidential action under the authority of a treaty . . . it seems clear that when the President acts pursuant to a duly ratified treaty . . . his authority is at its zenith." U.S. Br. 10 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). It is equally clear that presidential power is at its *nadir* "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." *The Steel Seizure Case*, 343 U.S. at 637 (Jackson, J., concurring). As Justice Black wrote for the Court in that seminal case,

"[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. Here, as in *Steel Seizure*, "[t]here is no statute that expressly authorizes the President" to overrule treaty interpretations by this Court and to preempt state law, "[n]or is there any act of Congress . . . from which such a power can fairly be implied." *Id.* Those statements are equally true if applied to treaties rather than statutes.[3]

The Solicitor General cites two sources of the President's supposed power to preempt state law and compel state courts to ignore controlling authority of this Court: (1) the Vienna Convention's Optional Protocol, in which the United States agreed to submit disputes over the interpretation of Article 36 to the ICJ, and (2) the U.N. Charter, in which the United States agreed to comply with decisions of the ICJ. U.S. Br. 8. But those provisions describe, at most, the procedural apparatus for *diplomatic* enforcement of obligations under the Vienna Convention. They do not impose any substantive treaty obligation, let alone any treaty obligation that purports to preempt state law or to deputize the President as a super-Supreme Court.[4]

It is quite telling that the Solicitor General fails to address those portions of the Vienna Convention that do impose substantive obligations on the United States. The

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[3] It goes without saying that a treaty properly ratified by the Senate has the same status as an Act of Congress under Article VI of the Constitution.

[4] As *Sanchez-Llamas* held, these treaty provisions do not make ICJ decisions "conclusive on our courts." 126 S. Ct. at 2684. Rather, the treaties "contemplate[] quintessentially *international* remedies," such as referral to the U.N. Security Council. *Id.* at 2685 (original emphasis).

Court held in *Sanchez-Llamas* that the Vienna Convention does not set aside the procedural rules that govern implementation of the treaty in the forum state, absent an explicit statement to the contrary. 126 S. Ct. at 2682-83. Instead, the Convention expressly requires that Article 36 rights be enforced *only* "'in conformity with the laws'" of the receiving state. *Id.* at 2680. Indeed, the Court stressed this point repeatedly. *See id.* at 2678, 2685, 2686. The Court therefore held that the Vienna Convention does not preempt state procedural default rules, *id.* at 2687, and accordingly provides no basis for the Court to direct preemption and thereby expand United States obligations under the treaty, *id.* at 2679, 2687.

But the Solicitor General defends presidential power to preempt state procedural default rules in compliance with *Avena*, despite this Court's decisions rejecting *Avena* and holding that the Vienna Convention forbids displacement of state procedural rules. U.S. Br. 8-9. The President may be free, as a matter of international diplomacy, to defer to the ICJ's misreading of Article 36. But the President's supposed power pursuant to the Vienna Convention to preempt state law is limited by the actual terms that the Senate ratified: the "United States ratified the Convention with the expectation that it would be interpreted according to its terms." *Sanchez-Llamas*, 126 S. Ct. at 2679.[5] And the terms that the United States ratified

[5] As the Solicitor General himself argued when *Medellin* was before this Court the first time, the Vienna Convention was ratified on the express understanding that it did not "change or affect present U.S. laws or practice." Brief *Amicus Curiae* of the United States in No. 04-5928, *Medellin v. Dretke*, at 21-22 ("The Senate Foreign Relations Committee . . . cited as a factor in its endorsement of the treaty that '[t]he Convention does not change or affect present U.S. laws or practice.'" (quoting S. Exec. Rep. No. 9, 91st Cong. at 2 (1969)).

expressly mandate enforcement of Article 36 "*in conformity with*" state procedural rules. *Id.* at 2685 (emphasis added).

Therefore, there is no authority for the President to preempt state law under the Vienna Convention because displacement of state law is "not only unauthorized by any [treaty]" – it is in fact *proscribed* by treaty. *Steel Seizure*, 343 U.S. at 586. *See also id.* at 602 (Frankfurter, J., concurring) ("It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words."); *id.* at 635-36 n.2 (Jackson, J., concurring) (This Court has "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.").

Although the Solicitor General relies on *Steel Seizure*, that case is his undoing, for the Vienna Convention, as authoritatively construed in *Sanchez-Llamas* and *Breard*, limits the means and manner by which the President may implement United States obligations under that treaty. As Justice Frankfurther explained in *Steel Seizure*, "[i]t is quite impossible . . . when Congress did specifically address itself to a problem, . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." 343 U.S. at 609 (concurring opinion).

B. The President Has No Inherent Foreign-Relations Power To Override This Court's Interpretations Of Treaties Nor To Preempt State Law.

All parties and *amici* agree on this:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Steel Seizure, 343 U.S. at 637-38 (Jackson, J., concurring). *See* Pet. Br. 35; U.S. Br. 9-10. Here, as in *Steel Seizure*, "it is not claimed that express constitutional language grants" the President power to reverse this Court's judicial construction of a treaty and to preempt state law; "[t]he contention is that presidential power should be implied from the aggregate of his powers under the Constitution." 343 U.S. at 587. To sustain this claim, the Court would have to hold that power to preempt state law is – as Justice Jackson put it – "within [the President's] domain and beyond control by Congress." *Id.* at 640 (concurring opinion).

As explained above, however, the limit on presidential power to preempt state procedural rules is imposed by the express terms of the Vienna Convention – the Senate ratified a treaty that mandates implementation of Article 36 "in conformity with" state law. To hold that the Senate

cannot limit its consent to a treaty by ratifying its express terms, and that the President is free to ignore the treaty terms ratified by the Senate because foreign relations is "within his domain and beyond control by Congress," *id.*, is to displace the Senate's explicit constitutional authority to give *or withhold* consent to a treaty. *See* Art. II, § 2.

Indeed, the President's power in this case is at a far lower ebb than in *Steel Seizure*. Here, as there, the Article I branch (the Senate) has spoken in a treaty to the issue before the Court (here, the limits of federal preemption of forum state procedural law). But unlike *Steel Seizure*, here the Article III branch has already definitively interpreted that treaty with respect to that precise issue of compliance with state rules of procedural default. *See Breard*; *Sanchez-Llamas*. There is no presidential power to preempt state law in defiance of the terms of a treaty as authoritatively interpreted by this Court. Such a power cannot possibly be "inherent" in Article II, because any such reading of Article II is precluded by the express terms of Article III, which vests "the judicial Power of the United States . . . in one supreme Court." "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court.'" *Sanchez-Llamas*, 126 S. Ct. at 2684.

C. The President Has No "Independent Authority" To Preempt State Law In The Course Of Resolving Disputes With Foreign Nations.

The Solicitor General argues that the President has "long established authority to resolve disputes with foreign

nations . . . involving international claims." U.S. Br. 12-15. *See also* Pet. Br. 35-37 (making a similar argument). But all of the authorities adduced for this proposition involved international reparations claims against foreign sovereigns or other foreign entities. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405 (2003); *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981); *United States v. Pink*, 315 U.S. 203, 227 (1942); *United States v. Belmont*, 301 U.S. 324, 326 (1937). There is nothing remotely like that here. This is not a case of an individual claimant in Texas reaching overseas and trying to apply Texas law to a foreign government or foreign corporation for alleged torts that took place overseas. This case involves a Texas criminal court applying Texas criminal procedures to Texas judicial proceedings governing a Texas prosecution of a foreign national who committed heinous criminal acts in Texas against Texas residents.

The Solicitor General's own principal authority, *American Ins. Ass'n v. Garamendi*, *see* U.S. Br. 13-15, 23, 25, distinguishes his cases and defeats his argument. The Court there identified the strength of the state's interest as a crucial factor in analyzing whether the President could preempt the state's law. *See* 539 U.S. at 419-20. *Garamendi* involved a California insurance-company disclosure statute. The Court acknowledged the importance of the state's general interest in "consumer protection," but the disclosure law was not "a generally applicable" consumer-protection law, but was instead a law that "single[d] out only policies issued by European insurance companies, in Europe, to European residents, at least 55 years ago." *Id.* at 425-26. The challenged law ordered the disclosure by the European companies of information about the policies they had issued to European policyholders who died in the Holocaust. *Id.* In that

historical, overseas scenario, the Court found California's highly attenuated regulatory interest to be quite "weak." *Id.* at 425.

In contrast, the Texas procedural default rule at issue here applies to all criminal defendants in Texas, not just foreign nationals, and governs all assertions of rights by defendants – not just consular rights, but also state and federal constitutional rights. And the Texas rule is being applied not to events that happened on the other side of the world half a century ago, but to a Texas criminal prosecution involving brutal crimes of violence – gang rape and murder – recently committed in Texas against Texas residents – a pair of teenage girls. With all of these distinctions, it is hard to imagine how this case could be less like the Solicitor General's cases involving international claims reparations.

In *Garamendi*, this Court ruled that a state's interest in applying forum law to foreign litigants and foreign events is to be considered under "general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction." 539 U.S. at 426.[6] What could possibly be more appropriate and more familiar than for a state to apply its own criminal laws to crimes committed within its borders by its own residents against its own citizens? It is beyond cavil that the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (citation omitted). With respect to the

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[6] The *Garamendi* Court indicated that "[w]here . . . a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict of a clarity or substantiality that would vary with the strength for the traditional importance of the state concern asserted." *Id.* at 419 n.11.

federal-state balance struck by the Constitution, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). *See Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (denouncing an invasion of State criminal authority that "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines").

Unsurprisingly, neither Petitioner nor *amicus* United States has identified *any* history of presidential orders, or congressional acquiescence therein, invoking the foreign-relations power to preempt application of state procedural law by state criminal courts to crimes committed within that state against the state's people. Petitioner offers two cases that, he says, define a "long and uninterrupted line of cases" in which this Court has applied treaties, "even if those treaties conflict with state law in areas of traditional state concern." Pet. Br. 28. But Petitioner's authorities are irrelevant to this case, where the President purports to preempt state law *not* pursuant to a treaty, *but despite this Court's ruling that the relevant treaty expressly preserves, rather than displaces, state law. See Breard*; *Sanchez-Llamas*.[7]

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[7] Petitioner cites *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and *Wildenhus's Case*, 120 U.S. 1 (1887). But *Worcester* struck down an application of Georgia criminal law not because it was in conflict with a presidential order, but because it was "repugnant to the Constitution, laws and treaties of the United States." 31 U.S. at 561. That is not this case. Petitioner's reliance on *Wildenhus* is even more baffling: the Court refused a writ of *habeas corpus* sought by the Belgian consul because the murder that Wildenhus was accused of took place in a New Jersey port and threatened public order, and was therefore, the Court held,

(Continued on following page)

This case is further distinguishable from *Garamendi* and its predecessors in other respects. In *Garamendi*, the federal government made an extensive showing of the disruption of United States foreign policy that would ensue if California's law, specially enacted to apply to a single class of foreign companies and foreign insurance policies, were applied to regulate overseas transactions by overseas parties 55 years ago. Neither the Solicitor General nor the Petitioner makes any such demonstration here, nor could they. At issue is a general law of criminal procedure applied to all *habeas corpus* petitions in the Texas courts. There are no extraterritorial parties; there is no extraterritorial operation of Texas law. Moreover, this Court has already held that the application of such procedural default rules by state courts is no disrespect to the Vienna Convention, because the relief that Petitioner and the Solicitor General demand – suspension of Texas' procedural default rule – would be "extraordinary" relief "that is accorded to almost no other right, including many of our most fundamental constitutional protections." *Sanchez-Llamas*, 126 S. Ct. at 2687-88. Therefore, "[i]t is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself." *Id.* at 2688.

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properly within local jurisdiction pursuant to the treaty in question. 120 U.S. at 17-18.

Petitioner also cites several cases that he characterizes as involving federal "treaties" that preempt state business regulation, property law, or tort law. *See* Pet. Br. 28 & 14. Insofar as they affirm preemption of local law by a *treaty*, the cases have no bearing on this case, where the President's assertion of power to preempt state law *contravenes* the treaty in question. Furthermore, like *Garamendi*, these cases distinguish themselves from the vital state interest in its own criminal law that is at issue here.

Indeed, it is hard to imagine how the action of the Texas court below could possibly give any discernible further affront to the Vienna Convention and the ICJ, given that: (1) this Court has already rejected the ICJ's construction of the treaty, (2) the President himself has denounced the *Avena* decision as incorrect, (3) the President has repudiated *Avena* as non-binding on United States courts, and (4) the President has announced that the United States no longer recognizes the ICJ's jurisdiction. *See id.* at 2685.

As the foregoing discussion makes clear, a presidential order that preempted state law and directed state courts to disregard decisions of this Court would raise grave constitutional issues of separation of powers and federalism. However, the Court need not venture down that path, because it is doubtful that the President in fact issued any such edict. The Solicitor General does not characterize the President's action as an "executive agreement" with foreign nations or even as a unilateral executive "order." The strongest term that the Solicitor General, the Petitioner, or even the President himself can offer is "determination" (U.S. Br. 3; Pet. Br. 10):

> "I have determined . . . that the United States will discharge its international obligations under the decision of the [ICJ] in [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

Pet. Br. 10 (quoting the President's statement).

To begin with, this "determination" is a unilateral act, not a solemn international "executive agreement" of the sort to which the Court emphasized deference in *Garamendi* and its ilk. *See Garamendi*, 539 U.S. at 406 n.2,

407, 408 & n.3, 413, 421; *Dames & Moore*, 453 U.S. at 665, 679, 682-83; *Pink*, 315 U.S. at 223, 230-31; *Belmont*, 301 U.S. at 326, 330-31.

Second, this "determination" is merely an internal memorandum within the executive branch. The difference between "Executive Branch actions," "*amicus* filings," "pronouncements," "letters," "decisions," and sundry other "statements" of executive policy on the one hand, and "legally binding executive agreements" on the other, is that the latter, but not the former, are meant to have the force of law. *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. at 328-29 & n.30 (1994). Even if the form of a presidential action is not necessarily dispositive, it is undeniable that the President's "determination" here does not display any of the indicia that usually accompany an executive order that is intended to have the force of law. And before the Court decides serious constitutional issues raised by an executive action, it should first ascertain whether the President's action was truly meant to be law. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional [a State's] otherwise valid" rule. *Barclays*, 512 U.S. at 330.

Third, although the President's "determination" does address *Avena*, it does *not* say that Texas procedural default rules are preempted – nor does it even imply that. Only the Solicitor General's *amicus* brief asserts preemption, and *amicus* briefs that urge a particular result are not a sufficient basis for a court to infer an executive order that is meant to bind. *Id.* at 329-30. The President's "determination" itself speaks only of "having State courts give effect to the decision *in accordance with general principles of comity*" – and "comity" is the hedge. Pet. Br. 10 (emphasis added).

Comity is "the courtesy of nations." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987) (citations omitted). It is a policy of courtesy and cooperation, rather than "a matter of absolute obligation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). The application of foreign law as a matter of "'comity is, and ever must be, uncertain,'" and "'no nation will suffer the laws of another to interfere with her own.'" *Id.* at 164 (quoting JUSTICE STORY, STORY'S CONFLICT OF LAWS § 28) (internal citation omitted).[8] Therefore, the President's explicit qualification of the state courts' consideration of *Avena* as deriving from "general principles of comity" means that those courts remain free to reject *Avena* if it prejudices the state's interests or conflicts and interferes with their own rules – which is precisely what the court below did. The President's invocation of the "ever . . . uncertain" rule of international comity as the basis for applying *Avena* renders the President's determination "merely precatory." *Barclays Bank*, 512 U.S. at 330.

Futhermore, the President's "comity" hedge should be considered in light of his simultaneous decisions: (1) to reject the *Avena* decision as incorrect, (2) to repudiate *Avena* as non-binding on U.S. courts, and (3) to disavow the jurisdiction of the ICJ. *See Sanchez-Llamas*, 126 S. Ct.

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[8] *See also Hilton v. Guyot*, 159 U.S. at 165 ("'[I]n the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger.'"); *id.* at 165 ("'It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.'") (citation omitted); *id.* at 166 ("'There is no obligation . . . to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States – *ex comitate, ob reciprocam utilitatem*.'") (quoting WHEATON'S INTERNATIONAL LAW (8th ed.) § 79).

at 2685 ("[I]t is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States."). Similarly, the President's "determination" in 2005 to have state courts apply *Avena* in accord with comity must be understood in light of this Court's controlling decision in *Breard* in 1998 that Article 36 does not displace state-court rules of procedural default. *See Sanchez-Llamas*, 126 S. Ct. at 2682-83. Thus, the President instructed state courts to consider (under the discretionary and non-binding policy of comity) a decision (that the President has denounced) of a foreign tribunal (that the United States no longer recognizes) enforcing a treaty on consular rights that had already been authoritatively interpreted by this Court to conflict with, and to have no impact on, state-court rules of procedural default. Characterizing the President's *Avena* "determination" as merely precatory almost seems to overstate its significance.

D. The Solicitor General's Remaining Arguments Are Unpersuasive.

Amicus United States offers a grab-bag of additional arguments to "inform" the Court's understanding of the President's preeminent role in foreign affairs. U.S. Br. 11-12, 16-21. The Solicitor General stops short of contending that these bases in themselves actually authorize the President to preempt state law and to order state courts to defy the decisions of this Court. This is prudent, because the only illumination that these arguments really cast on this case reveals just how unprecedented and illegitimate the President's action truly is.

1. The President's assumption of responsibility for responding to ICJ decisions proves nothing.

The Solicitor General contends that, historically, the President has determined how the United States responds to decisions of the ICJ. The only authority offered is a *cf.* citation to a sentence fragment from *Dames & Moore* that supposedly finds relevance in "a 'history of congressional acquiescence' in presidential authority." U.S. Br. 19 (quoting *Dames & Moore*, 453 U.S. at 678). What the Court actually said, in the rest of the sentence that the Solicitor General omits, is that "[a]t least this is so [1] *where there is no contrary indication of legislative intent* and [2] when, as here, there is a history of congressional acquiescence *in conduct of the sort engaged in by the President*." 453 U.S. at 678 (emphasis added).

Taking the second caveat first, the "conduct" in which the President has engaged here is preempting a Texas procedural-default rule and ordering the Texas courts to ignore a controlling decision by this Court. The Solicitor General proffers *not even one* prior historical example of *that*, let alone a "history" of congressional acquiescence in such presidential usurpations of both legislative and judicial power. Thus *Dames & Moore* subverts, rather than supports, the Solicitor General.

The other caveat is that a history of like executive actions is relevant "where there is no contrary indication of legislative intent." 453 U.S. at 678. That distinguishes this case as well, for the Legislative Branch (the Senate) clearly indicated, in the language of the Vienna Convention itself, that the consular rights of Article 36 were to be implemented "in conformity" with local law, including local procedural laws. *Sanchez-Llamas*, 126 S. Ct. at 2685. Thus

Dames & Moore, the Solicitor General's sole authority, defeats his argument.

Furthermore, the four ICJ cases that the Solicitor General cites as defining a history of congressional acquiescence in presidential responses to the ICJ are entirely beside the point. *See* U.S. Br. 19-20. In *none* of those cases did the President take any action that raised any question that he was exceeding his lawful authority, whether by preempting state law or otherwise. Indeed, none of the cases even involved any domestic orders by the President at all.[9]

The *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27), is the most revealing of the Solicitor General's examples, because it involved Article 36. The ICJ ruled that the United States had violated the treaty and must allow reconsideration for defendants denied their consular rights. The President, as here, determined that the ICJ's judgment was not binding but then, rather than trying to preempt state law, the President merely sent state governors, parole boards and clemency boards precatory letters "encouraging them" to consider the lack of consular notification. U.S. Br. 20-21. Thus the case presented no issue of presidential intrusion on state (or federal judicial) authority because the President did *not* attempt to intervene in state "avenues for judicial review" nor presume to preempt the "domestic law" governing such proceedings. U.S. Br. 20. Would that the President had taken the same course here.

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[9] In the Nicaraguan case, the President ignored the ICJ's decision and took no domestic action whatever. *See* U.S. Br. 20. In the case involving Maine, the ICJ resolved a boundary dispute in international waters and the President's sole response was to tinker with international maps. *Id.*

Congressional "acquiescence" in executive responses to ICJ decisions that were devoid of domestic impact proves, at most, that Congress is not troubled when the President does not do anything. Contrary to the Solicitor General's suggestion, this sort of "acquiescence" does not amount to a congressional license for the President to ignore a decision of this Court or to preempt state law – especially not in the face of a Senate-ratified treaty specifying that state law is not to be displaced.[10]

2. The President's possession of other responsibilities "related" to the authority he claims here proves nothing.

The Solicitor General finds it "[o]f particular importance" that Congress has authorized the President to direct functions connected with United States participation in the UN and the ICJ (U.S. Br. 16), and has given the President broad authority to obtain the release of citizens detained abroad. U.S. Br. 17; *see also* Pet. Br. 39-41. The only case authority offered is, again, another *cf.* citation to the same page of the *Dames & Moore* opinion: "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion

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[10] The Solicitor General does not even bother to discuss his fourth ICJ case or the President's reaction to it. U.S. Br. 19 n.4. The President's actions there apparently raised no issue of the Executive exceeding his authority with respect to the Judiciary or the States because the dispute before the ICJ involved U.S. consular jurisdiction in Morocco and the immunity of U.S. nationals from Moroccan laws and taxes. *See Case Concerning Rights of Nationals of the United States in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 212-13 (Aug. 27).

may be considered to 'invite'" presidential action in related areas. 453 U.S. at 678. *See* U.S. Br. 16.

Once again, the Solicitor General omits the two caveats contained in the next sentence. *See* Part II.D.1., *supra*. First, congressional grants of broad presidential power in related areas "invite" presidential exercises of discretion *except* where, as here, there is a contrary indication of congressional intent – again, the express language of the treaty mandating enforcement of Article 36 "in conformity with" local law. The second condition is likewise absent: there is no history of congressional acquiescence in presidential orders preempting state procedural laws or ordering state courts to ignore a controlling decision by this Court. As before, the Solicitor General is unable to adduce even a single example for the President's unprecedented usurpation of judicial and state authority.

Furthermore, nothing in the two statutes cited by the Solicitor General even vaguely hints that the President is authorized to order state courts to ignore a controlling decision of this Court or to preempt state criminal law whenever the President believes that doing so would advance United States relations with some foreign country. Indeed, the Solicitor General concedes that these statutes do not even "authorize the President to implement an ICJ decision." U.S. Br. 17.

3. The President's role in litigation that implicates foreign policy proves nothing.

The Solicitor General contends that the President has an "established role in litigation implicating foreign-policy concerns" and that the President has sometimes "exercised authority to determine whether an international rule of

law should be applied in domestic courts." U.S. Br. 17; *see also* Pet. Br. 29-30, 33. The leading example offered is the President's *former* role in deciding whether a foreign nation received sovereign immunity in American courts. U.S. Br. 17. But as the United States concedes, that ended more than 30 years ago. *Id.* Furthermore, that *ancien regime*, as the Solicitor General's own authority explains, involved the courts deferring not to the President, but to the "decisions of the political *branches*" – that is, to the Legislative and Executive Branches together. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (emphasis added).

Indeed, the Executive's former role in offering his "suggestions" in court about sovereign immunity came to an end because their "application proved troublesome" and the President's decision-making was "often" tainted by "diplomatic pressure" and plagued by "political considerations." *Id.* at 487. Congress enacted the Foreign Sovereign Immunities Act ("FSIA") "to free" the process from the "diplomatic pressures" to which the Executive was historically vulnerable, *id.* at 488, and to which the Executive, ironically, clearly succumbed in issuing the very "determination" at issue here. The question of sovereign immunity is now decided by the Judicial Branch "on purely legal grounds" in accord with the Legislative Branch's "comprehensive set of legal standards." *Id. See also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990) (Wallace, J.) (Congress enacted the FSIA to render Executive immunity "suggestions" non-binding because Executive decision-making was not "the rule of law"). Far from establishing a history of congressional acquiescence in unbridled Executive authority in foreign-policy litigation, the FSIA was enacted 30 years ago *to limit the discretion of the Executive* in this area.

The second example offered by the Petitioner and the Solicitor General is *Sanitary District v. United States*, 266 U.S. 405, 425-26 (1925), where this Court held that the President has inherent power to sue a political subdivision of a State even if no statute expressly confers such standing. *See* U.S. Br. 18-19; Pet. Br. 29, 33. Would that the President had followed the example set in that case. Here the President did not file a lawsuit asking this Court to interpret and apply the relevant treaty as the supreme law of the land. Instead, the President acted unilaterally, purporting to overrule a controlling decision of this Court interpreting that treaty (*Breard*) and to preempt Texas rules of criminal procedure on his own say-so.

Consider the reasoning behind the proposition advanced by Petitioner and the Solicitor General: because the President has standing to petition this Court for interpretation and enforcement of a treaty, the President can instead simply dictate the result he seeks and thereby preempt state law. They urge this reasoning on the Court even here, where the treaty, as ratified by the Senate and construed by this Court, expressly preserves those state laws and mandates treaty implementation "in conformity with" those laws. Thus would Petitioner and the President invade the legitimate provinces of the Article I Legislature, the Article III Judiciary, and the sovereign States. Rarely has the Executive attempted such a bold constitutional trifecta.

4. The President's qualifications to act in foreign affairs cannot override federalism or the Constitution's separation of powers.

Finally, the Solicitor General argues that the President is "uniquely suited," "best positioned," and "uniquely

qualified" to "respond expeditiously" to decisions of the ICJ. U.S. Br. 11-12; *see also* Pet. Br. 37. These points are pertinent to a discussion of how to divide government power in the first instance. *See, e.g.*, THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (J. Cooke ed. 1961). But they cannot provide a fulcrum for prying the separation of powers out of the Constitution's structure, nor for overriding the rule of law that the Senate actually ratified in the Vienna Convention, as authoritatively construed by this Court.

If the Solicitor General's "efficiency" argument sounds familiar, it is because this Court has heard it, and rejected it, so often. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 (1986) ("the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.") (citation omitted); *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government. . . . "); *United States v. Brown*, 381 U.S. 437, 443 (1965) ("This 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."). Unsurprisingly, the President pressed this same "efficiency" argument in *The Steel Seizure Case*, where it was embraced by the dissent, *see* 343 U.S. at 690 (Vinson, C.J., dissenting), and, naturally, rejected by the Court. *See id.* at 613-14 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 649-50, 655 (Jackson, J., concurring).

Here, the Article I branch, in the form of the Senate, has ratified a treaty and thereby enacted the supreme law of the land for the President to enforce: the Vienna

Convention and its requirement that consular rights thereunder be implemented "in conformity with" the law of the forum state. And the Article III branch has given that law an authoritative construction. The Article II branch has no power either to legislate unilaterally a different rule that suits its needs, *see Clinton v. New York*, 524 U.S. at 445-46, nor to reverse this Court and render an interpretation of the treaty that is more to its liking. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Sanchez-Llamas*, 126 S. Ct. at 2684.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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August 2007

FILED
AUG 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICI CURIAE* OF RANDY AND SANDRA ERTMAN AND THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Petitioner listed two questions in his petition for certiorari, rephrased in his brief as follows:

1. Did the President of the United States act within his authority when he determined that the states must comply with the United States's treaty obligation to give effect to the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I.C.J. 12 (Mar. 31, 2004) (No. 128), in the cases of the 51 nationals of Mexico named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

Petitioner also briefed a third question in Part IV of his brief:

3. Is the application of the Texas successive petition statute in this case inconsistent with the *Avena* decision, and if so to what extent?

This brief *amici curiae* addresses this implicit third question.

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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

BRIEF *AMICI CURIAE* OF RANDY AND SANDRA ERTMAN AND THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[1]

Randy and Sandra Ertman are the parents of Jennifer Ertman, one of the victims in this case. Jennifer was just 14 years old when she was raped and murdered by José Medellín and his gang. She would be 29 now. Her parents have waited longer for justice to be done in this case than Jennifer lived her entire, much too short, life. Medellín's demand for yet more proceedings in this already exhaustively reviewed case

1. This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside monetary contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

is contrary to *amici*'s interest in seeing justice done without unreasonable delay. See 18 U. S. C. § 3771(a)(7).

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioner Medellín claims that the State of Texas is required to give effect to the decision of the International Court of Justice in the *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31). He further claims that giving effect to *Avena* requires that Texas disregard its procedural default rules altogether and reconsider *de novo* the question of whether he was prejudiced by the arresting authorities' failure to notify the Mexican Consulate of his arrest. He has already had a determination, on his first application, that he failed to show any prejudice. Nothing in *Avena* entitles him to a second determination of the same question. To the extent he makes new claims of prejudice which he failed to make in the proceeding that *followed* notification of the consulate, nothing in *Avena* prevents the State of Texas from applying its standard default rules to such claims. Delaying the already long-overdue execution of this well-deserved sentence and of sentences in similar cases would be contrary to the rights of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The Crime

Petitioner's statement of the case barely mentions the facts of the unspeakably brutal crimes committed by José Medellín and his pack of predators. See Brief for Petitioner 6. However, these facts are essential to understanding just how weak his claim of prejudice is. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 700 (1984) ("Given the overwhelming aggravating factors . . .").

On the night of June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena[2] were taking a shortcut home when they encountered a gang called the Blacks and Whites, including the petitioner, José Medellín. *Medellín* v. *State*, No. 71,997 (Tex. Crim. App., May 16, 1997), App. to Pet. for Cert. in *Medellín* v. *Dretke*, No. 04-5928, p. 4a (cited below as "Prior Cert. Pet. App.").[3] "When Elizabeth tried to run from appellant, he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but [two other gang members] grabbed her and threw her down as well." *Ibid.* The group then proceeded to have "fun" by brutally gang raping both girls, and they bragged about it afterward. See *id.*, at 5a.

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2. Soft-pedaling the facts of the crime is standard practice in defense briefs, but counsel for petitioner has gone considerably beyond the norm by implying that the victims of this crime were adults. See Brief for Petitioner 6 ("murders of two young women"). Jennifer and Elizabeth were, in fact, teenage girls.

3. We understand that some of the documents from the prior case will be reprinted in an appendix to Respondent's Brief, but the pagination of this appendix was not available by the printing deadline for this brief.

"Appellant related to [the brother and sister-in-law of one of the gang members] that he sexually assaulted one of the girls and bragged about having 'opened' her since she apparently had been a virgin. As if to accentuate his conquest, appellant showed Christina his blood soaked underwear. Appellant related that after another gang member sexually assaulted the second girl, he 'turned her around' and anally raped her." *Ibid.* The gang murdered the girls to prevent them from identifying their attackers and divided up their possessions. See *id.*, at 5a-6a. Medellín personally "took off one of his shoelaces and strangled at least one of the girls with it." *Id.*, at 6a.

The evidence against Medellín included his written statement after arrest, in which he admitted substantial participation in the crimes, see *id.*, at 6a; J. A. in *Medellín* v. *Dretke*, No. 04-5928, pp. 14-18, including his personal participation in strangling Elizabeth. *Id.*, at 17. This statement was made between 5:54 a.m. and 7:23 a.m. on the day of his arrest, June 29, 1993. *Id.*, at 14-15. Medellín informed the authorities that he was born in Mexico in the same statement. See *id.*, at 15. Medellín was not advised that he had a right to have the Mexican Consulate notified, nor was the consulate notified.

The Case

Medellín was convicted of capital murder and sentenced to death, and the Texas Court of Criminal Appeals affirmed on direct appeal. Prior Cert. Pet. App. 3a. Six weeks after the affirmance, on April 27, 1997, Mexican consular authorities learned of the case and began providing assistance to Medellín. Brief for Petitioner 7. Eleven months later, on March 26, 1998, Medellín filed a state habeas corpus petition. Ground 3 of this petition is the Vienna Convention claim. Pages

25-28 of this petition contain the argument on enforceability of the treaty in the habeas proceeding and petitioner's standing to raise the claim. Pages 28-31 are the substantive argument, and this portion of the petition is reproduced in the Appendix to this brief. The only prejudice claimed is the obtaining and introduction of Medellín's confession.

Attached to and incorporated in the petition is an affidavit from the Consul General. The only prejudice from the Vienna Convention violation claimed by the Consul General was that, if they had been notified prior to interrogation, they would have advised him to assert his *Miranda* right to have counsel present during interrogation. Prior Cert. Pet. App. 172a-173a. The Consul General's affidavit does not make any claim that the consulate would have arranged for a more effective presentation of mitigating evidence at the penalty trial.

The trial court denied the habeas petition. In addition to procedural default and standing grounds, the state habeas judge also rejected Medellín's Vienna Convention claim on the merits:

> "16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the applicant's constitutional rights were safeguarded . . . ." Prior Cert. Pet. App. 56a.
>
> "17. The applicant . . . fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex parte Barber*, 879 S. W. 2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant

> must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Id.*, at 57a.

The Court of Criminal Appeals accepted the trial court's findings and conclusions on October 3, 2001. *Id.*, at 32a-33a.

Medellín filed a federal habeas petition on November 28, 2001, and amended it the following July. The petition raised Sixth Amendment and due process issues, in addition to the Vienna Convention issue. See *Medellín* v. *Cockrell*, No. H-01-4078 (SD Tex., June 25, 2003), Prior Cert. Pet. App. 62a. Like the state habeas court, the Federal District Court rejected the Vienna Convention claim on the merits as well as on procedural grounds.

> "The police officers informed Medellín of his right to legal representation before he confessed to involvement in the murders. Medellín waived his right to advisement by an attorney. Medellín does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellín would not have waived those rights as he did his right to counsel. Medellín fails to establish a 'causal connection between the [Vienna Convention] violation and [his] statements.' [Citation.] Petitioner has failed to show prejudice for the Vienna Convention violation." *Id.*, at 84a-85a (footnote omitted).

The Court of Appeals denied a certificate of appealability. *Medellín* v. *Dretke*, 371 F. 3d 270, 281 (CA5 2004). On the procedural default point, the Court of Appeals held it was bound by *Breard* v. *Greene*, 523 U. S. 371, 375 (1998) (*per curiam*), until such time as this Court overrules it. See 371 F. 3d, at 280. On the

question of standing, the panel followed circuit precedent. See *ibid.*

This Court granted certiorari. Later, on February 28, 2005, President Bush issued a memorandum stating that the United States would comply with the decision of the International Court of Justice "by having State courts give effect to the decision in accordance with general principles of comity . . . ." See Memorandum for the Attorney General (Feb. 28, 2005), App. to Pet. for Cert. 187a. On March 24, Medellín filed the present application in state court.

On May 23, this Court dismissed the writ of certiorari as improvidently granted, noting the numerous impediments in federal habeas to this claim. *Medellín* v. *Dretke*, 544 U. S. 660, 664-667 (2005) (*per curiam*). The Court noted that review of the state decision in the present case would remain available. See *id.*, at 666. The Texas Court of Criminal Appeals ordered briefing on whether Medellín met the requirements for a successive petition. *Ex parte Medellín*, 206 S. W. 3d 584, 586 (2005).

While the case was pending in the state courts, this Court decided *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006), along with a companion case, *Bustillo* v. *Johnson*. In *Sanchez-Llamas*, the Court held that the Vienna Convention does not create a remedy of exclusion of evidence, and that absent such a requirement in the treaty itself the federal courts could not impose an exclusionary rule on the states. *Id.*, 126 S. Ct., at 2678-2682. In *Bustillo*, the Court held, notwithstanding *Avena*, "that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." *Id.*, at 2687.

The Texas Court of Criminal Appeals decided the present case on November 15, 2006, on the basis of Texas's statutory successive petition rule, Section 5(a), Article 11.071 of the Texas Code of Criminal Procedure.[4] The Court held "that *Avena* and the President's memorandum do not preempt Section 5 and do not qualify as previously unavailable factual or legal bases." *Ex parte Medellín*, 223 S. W. 3d 315, 321 (Tex. Crim. App. 2006).

SUMMARY OF ARGUMENT

Petitioner contends that if the *Avena* decision is binding, the procedural default rules of Texas are completely preempted. As Justice Breyer noted in the *Bustillo* dissent, that would be an extreme interpretation of *Avena*. A reasonable interpretation is that procedural default rules are not preempted under

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4. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Avena unless the Vienna Convention violation itself caused the default.

In the present case, Medellín's first state habeas petition, filed with the assistance of the consulate, claimed only one form of prejudice—the obtaining and admission of his confession. The claim of prejudice he makes now—lack of assistance in making his case in mitigation—was defaulted *after* the consulate had actual notice. *Avena* does not preclude application of the standard default rules to this claim.

Medellín's confession claim has been addressed on the merits in alternative holdings by both the state and federal courts. Nothing in *Avena* requires a third review. Further, in light of *Sanchez-Llamas* and *Avena* itself, these rulings were manifestly correct.

Regardless of how the Court resolves the international law issues in this case, there is no need for a remand for further proceedings. This case has already gone on far too long and had far too many proceedings. This Court reviews judgments, not opinions. The judgment was correct and should be affirmed outright, bringing this case to an already overdue close.

ARGUMENT

I. *Avena* does not preclude application of Texas's standard default rules to any default occurring after the consulate received actual notice.

Petitioner contends, "The Texas procedural default statute, as interpreted and applied by the Texas Court of Criminal Appeals [to this case], is thus flatly inconsistent with the treaties requiring the United States to abide by the *Avena* decision . . . ." Brief for Petitioner 44. Analysis of this argument must begin with the

International Court of Justice's (ICJ) understanding of the procedural default rule. Quoting Mexico's argument, *Avena* defines the procedural default rule this way: " 'a defendant who could have raised, but fails to raise, a legal issue *at trial* will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*'." *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128, ¶111 (Judgment of Mar. 31) (*Avena*) (first emphasis added);[5] see also *id.*, ¶133. This is the trial default rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Presumably, the word "generally" in this definition recognizes the cause-and-prejudice and actual innocence exceptions. Significantly, *Avena*'s definition excludes defaults at stages of the proceedings later than trial. Statements in the *Avena* opinion referring to the "procedural default rule" therefore do not necessarily refer to later defaults, and they should only be extended to such defaults when the underlying rationale of the opinion so requires.

The underlying rationale of the procedural default holding is that no "provision has been made to prevent [the procedural default rule's] application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena*, 2004 I. C. J. No. 128, ¶113. This rationale is flawed, and this Court rejected it in *Bustillo* v. *Johnson*,

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5. The opinion continues at that point: "The rule requires exhaustion of remedies, *inter alia*, at the state level and before a *habeas corpus* motion can be filed with federal courts." This is not technically correct. Exhaustion and procedural default are separate, although related, rules. See, *e.g.*, *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999); *id.*, at 850-851 (Stevens, J., dissenting).

decided with *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006). When the state has provided or the defendant has retained competent counsel, the failure to inform does not preclude counsel from raising the Vienna Convention[6] issue. See *id.*, 126 S. Ct., at 2687, 165 L. Ed. 2d, at 584. When defense counsel is ineffective, that ineffectiveness is both cause for default and an independent claim for relief. See *Murray* v. *Carrier*, 477 U. S. 478, 488-489 (1986).[7]

If this Court should decide that the pertinent treaties or the President's memorandum requires the United States to accept this rationale despite its flaw, then *Carrier* provides the guide to accommodate *Avena* within the framework of American habeas corpus jurisprudence:

> "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not '[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default." 477 U. S., at 488.

Where the denial of assistance that defendant was entitled to receive is the cause of a default, that denial

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6. Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U. S. T. 77, T. I. A. S. No. 6820.

7. In a federal habeas corpus petition filed long after the consulate had actual notice of the case, Medellín attacked trial counsel's performance on multiple grounds, but failure to raise the Vienna Convention issue and failure to contact the consulate himself were not among them. See Prior Cert. Pet. App. 62a, 68a-79a.

is sufficient for the cause prong of the *Sykes* test. If the Court accepts *Avena*'s assumption of a causal connection between the failure to notify the consulate and the default of the Vienna Convention claim, then the analogy is complete. *Strickler* v. *Greene*, 527 U. S. 263, 288-289 (1999) is similar, where the prosecutor's inadvertent nondisclosure of impeachment evidence was both an element of the petitioner's *Brady*[8] claim and cause for his failure to raise it in state court.

The violation-as-cause rationale only extends to defaults occurring before the violation is corrected. In *Gray* v. *Netherland*, 518 U. S. 152, 162 (1996), unlike *Strickler*, the evidence which had not been disclosed to defense counsel before trial was known to habeas counsel before he filed his state habeas petition. Hence, it was defaulted by failure to raise it in that proceeding. Similarly, failure to notify the consulate, or to inform the defendant of his right to have the consulate notified, has no causal connection to any default occurring after the consulate has actual knowledge, whether through official channels or any other means. *Avena* is concerned with cases where "application of the procedural default rule would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violate paragraph 2 of Article 36." *Avena*, 2004 I. C. J. No. 128, ¶ 113. Once the consulate has actual notice, it is not prevented from assisting the defendant in presenting his Vienna Convention claim in the next available procedure, as in fact the consulate did in the present case, see Brief for Petitioner 7, and any prior lack of notice would not be cause for a default beyond that point. Cf. *Avena*, *supra*, ¶ 104 (no breach of duty to enable consulate to arrange representation in cases

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8. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

where consulate learned of arrest, by whatever means, before trial). Application of the procedural default rule to a default occurring after actual notice would not be a violation of paragraph 2 of Article 36 as construed by *Avena*.

This is largely how the *Bustillo* dissent understood *Avena*. "[T]he ICJ understood the Convention to prevent application of the procedural default rule only where the arresting authorities' failure to inform the foreign national of his Convention rights brought about the procedural default in the first place." 126 S. Ct., at 2700 (Breyer, J., dissenting), citing *Avena*, *supra*, ¶ 113 (emphasis added). The dissent emphasized repeatedly that absent a causal link between the violation and the default, the state procedural default rules continue to operate without conflict with the Convention or the *Avena* decision. See *id.*, at 2698, 2700, 2702-2703, 2708.

To interpret *Avena* as preempting state procedural rules completely, as petitioner claims in this case, see Brief for Petitioner 9, 44, would be reading it and *LaGrand*[9] "as creating an extreme rule of law." *Bustillo*, *supra*, 126 S. Ct., at 2703 (Breyer, J., dissenting). *Avena* "nowhere forbids a state court conducting such a 'review' to bar claims not timely made provided the violation itself did not cause the delay." *Ibid.*, citing *Avena*, *supra*, ¶ 139. Consistently with *Avena*, then, a State may continue to apply its standard default rules to any claim not made at the first opportunity after the consulate's receipt of actual notice of the case.

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9. *LaGrand Case* (*F. R. G.* v. *U. S.*), 2001 I. C. J. 466 (Judgment of June 27).

II. All of petitioner's claims have been either considered on the merits or defaulted after actual notice, and the Texas court properly refused to hear the successive petition.

In his successive state habeas application, petitioner claimed that the State's noncompliance with the Vienna Convention deprived him of the assistance of the Mexican Consulate in building his case in mitigation at the penalty phase of his capital murder trial. See Subsequent Application for Post-Conviction Writ of Habeas Corpus in *Ex parte Medellín*, No. AP-75,207, pp. 36-44 (Tex. Crim. App.) (cited below as "Subsequent Application"). Not a word of this argument appears in his first state habeas petition, filed 11 months after the consulate had actual notice of the case. See Appendix to this brief. Application of the standard Texas rules to this claim violates neither the spirit nor the letter of the *Avena* decision. Like the *Brady* claim in *Gray*, while the violation itself may be considered "cause" not to raise it at trial or on direct appeal, there was no cause for failure to raise it in the first state habeas. Texas's standard procedural rules therefore remain applicable to that default, whether the State is obligated to comply with *Avena* or not.

"Nothing the State did or omitted to do here 'precluded counsel from . . . rais[ing]' " in the first state habeas proceeding the prejudice petitioner now claims. Cf. *Bustillo* v. *Johnson*, decided with *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 2690, 165 L. Ed. 2d 557, 587 (2006) (Ginsburg, J., concurring in the judgment), quoting *Avena*, *supra*, ¶ 113. Therefore, even if this Court concludes that the Texas Court of Criminal Appeals erred in not treating *Avena* as binding, its judgment should still be affirmed as to all of Medellín's Vienna Convention claims, except the confession claim, on the ground that *Avena* does not

preempt the Texas statute as to these claims. "[T]his Court reviews judgments, not opinions . . . ." *Chevron U. S. A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984).

Petitioner's brief in this Court makes no mention of the only Vienna Convention claim he made in his first state habeas petition, *i.e.*, that his confession was the fruit of a Vienna Convention violation and had to be suppressed. That omission is not surprising, given that the *Avena* decision which is the central pillar of his argument also demolishes the confession claim. We will discuss it only briefly here, in case it comes up in the reply brief or at oral argument.

As noted *supra*, at 5-6, the state trial court did not rest its rejection of Medellín's Vienna Convention claims on procedural default alone. The court also held, "the applicant . . . fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction and punishments." See Prior Cert. Pet. App. 57a, ¶17. The Court of Criminal Appeals adopted this finding. See Prior Cert. Pet. App. 33a. Before *Avena* had even been decided, Medellín had already received the determination of prejudice he now claims to be entitled to. See *Ex parte Medellín*, 223 S. W. 3d 315, 33a, and n. 1 (Tex. Crim. App. 2006) (Hervey, J. concurring), citing Brief for Criminal Justice Legal Foundation as *Amicus Curiae*, available at http://www.cjlf.org/briefs/MedellinCCA.pdf.

Medellín made the same claim again in the Federal District Court. That court rejected the claim on multiple alternate grounds, including the merits. "Medellin fails to establish a 'causal connection between the [Vienna Convention] violation and [his] statements.' [Citation.] Petitioner has failed to show prejudice for the Vienna Convention violation." Prior Cert. Pet. App. 85a (footnote omitted).

The International Court of Justice (ICJ) did not render an individualized determination that the required review had not yet occurred in Medellín's case. In the court below, petitioner maintained that the ICJ had so held in paragraphs 112-113 of the *Avena* decision, see Subsequent Application 16, but it did not.

In paragraph 112, the ICJ recaps what it said about the procedural default rule in its previous opinion in *LaGrand*. After noting that LaGrand had been prevented from effectively challenging his judgment by the procedural default rule, the ICJ states, "This statement of the Court *seems* equally valid in relation to the present case, where *a number* of the Mexican nationals have been placed exactly in such a situation." *Avena*, 2004 I. C. J. No. 128, ¶ 112 (emphasis added). This equivocal statement does not even specify how many cases it refers to, much less which cases, and cannot be considered a holding in this specific case.

In paragraph 113, the court notes that the procedural default rule has not been revised since *LaGrand*, and "the procedural default rule *may* continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the [Vienna Convention] violation . . . prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence." *Avena*, *supra*, ¶ 113 (emphasis added). The actual holding in paragraph 113 is that the ICJ will not consider whether there is a violation of the duty to provide a remedy until all judicial proceedings have concluded. The ICJ therefore did not examine the individual circumstances of any of the cases that had not yet reached that point, including Medellín's case. The United States has already discharged any obligation it may have to consider Medellín's confession claim, and *Avena* does not hold otherwise.

In addition, in light of *Avena* and *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006), the rejection of the confession claim by the state and federal courts was clearly correct. The opinion of the Court in *Sanchez-Llamas* explains why suppression is not required by the Vienna Convention. See 126 S. Ct., at 2678-2682. Justice Ginsburg's concurring opinion explains why suppression was not required under *Avena*. See *id.*, at 2688-2689. There is no requirement that notification of the consulate precede questioning, and notification was not overdue at the time Medellín confessed. His confession and its subsequent introduction into evidence were not the fruit of the Vienna Convention violation.

To make a case for mandatory review of a defaulted claim of prejudice under *Avena*, the petitioner must establish two causal connections. First, the prejudice he claims must be the result of the Vienna Convention violation. Second, the earlier default of the claim must also be the result of the violation. At least one of these connections fails for each claim in this case. Medellín's confession was not the result of the violation. His failure to bring the claim of prejudice regarding preparation of his case in mitigation in his first habeas petition was not the result of the violation. Whether *Avena* is binding or not, Texas may lawfully apply its successive petition statute to deny further consideration of this case.

This case has produced much lofty discussion about international law and the separation of powers. We must not forget, though, that this case is about a real crime against real people. Even in the sordid company of other capital cases, this crime stands out as an act of exceptional, unspeakable savagery and depravity. Two teenage girls suffered unimaginable horrors at the hands of José Medellín and his pack of predators and

then had their young lives snuffed out when they had barely begun. Thirteen long years of litigation have followed the rendition of the thoroughly deserved judgment in this case, and most of that litigation has had nothing to do with Medellín's guilt of the crime. Enough is enough. Regardless of how the international law issue is decided, this case can and should end with this Court's decision.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

August, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amici Curiae

APPENDIX

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS
AND
IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
339TH JUDICIAL DISTRICT

Ex parte José Ernesto Medellín	)	
Applicant	)	No. 675430-A
	)	

APPLICATION FOR WRIT OF HABEAS CORPUS

* * *

[p. 25]

B. VIOLATION OF THE VIENNA CONVENTION CONSULAR RELATIONS OF 1963

GROUND FOR REVIEW THREE: The failure to notify applicant of his rights to inform the Mexican Consulate of his arrest for capital murder, as mandated by international treaty, violated applicant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

* * *

[p. 28]

Additional Facts

Applicant was born in Mexico and remains a Mexican citizen. Although both his parents are legal immigrants, applicant did not immigrate with his parents. Instead he stayed in Mexico for a period of at least five years after his parents entry into the United States. He later moved to live with his parents in Houston. At the time of his arrest, applicant was eighteen years of age.

After obtaining an arrest warrant for applicant and arresting him, applicant was transported to the Houston Police Department. Applicant was not notified of his rights under the Vienna Convention to contact the Mexican Consular in Houston, nor was the consular contacted. Instead, authorities sought to interview applicant and to obtain a confession to a crime subject to the death penalty. Even after obtaining this confession, authorities did not advise applicant of his rights to contact the consular, and did not advise the consular of applicant's arrest. Had applicant been advised of his rights under the Vienna Convention, or had the Mexican Consular been contacted by authorities, the Consular would have taken steps to protect applicant's rights and to secure immediate representation for applicant.[38]

Argument

There can be no doubt that applicant's rights under the Vienna Convention were violated by the authorities' failure to advise him of his right to contact the Mexican

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38. Applicant specifically incorporates by reference "Exhibit J", a statement from the Mexican Consular, as if fully copied and set forth at length.

Consular. Likewise, there can be no doubt the authorities took no steps to protect these rights. Instead, the authorities immediately sought additional evidence against applicant. Evidence which was to be used to secure his conviction for capital murder and, ultimately to secure his execution. And, having been denied the rights guaranteed him, applicant provided such evidence in the form of a written confession.

There can be no reasonable excuse for this failure on the part of the authorities. The Vienna Convention was not recently ratified—the treaty was some thirty years old. The authorities had sufficient time to secure an arrest warrant and they coordinated a multiple arrest using many officers. The persons arrested were separated and individual officers interviewed them. The only expediency which existed was that of the authorities in seeking a confession.

Authorities are now well versed in the constitutional rights which must be accorded every individual. Indeed, after a period of dark history in our criminal jurisprudence, the Supreme Court sought to ensure that no person be subjected to police interrogation without at least the benefit of the knowledge of their guaranteed rights under the United States Constitution. ***Miranda v. Arizona***, 384 U.S. 436 (1966). Indeed, the Court held that mere knowledge of these rights was insufficient—such rights must be knowingly and intelligently waived before a person is to be subjected to police interrogation. Id., 384 U.S. at 444. ***See also***, ***Moran v. Burbine***, 476 U.S. 412, 421 (1986); ***Colorado v. Connelly***, 479 U.S. 157, 170 (1986); ***and***, ***United States v. Cooper***, 949 F.2d 737, 742 n. 14 (5th Cir. 1991).

The right to knowledge and access to a Consular for a foreign national is no less important than the right to

an attorney or the right to remain silent.[39] A foreign national in the custody of authorities of a foreign country is no less intimidated than one of our own citizens in custody. And the importance of this right to the international community is evident from the number of signatories to this treaty (154), and the re-affirmance of these rights by the United States and Mexico.

A conviction which is based upon evidence obtained in violation of this international right cannot be the result of a "fair" proceeding. The Due Process Clause is grounded upon the principals of fairness. The Courts of this nation have again and again recognized that the concept of due process and its application of various constitutional rights is premised on fundamental fairness. ***Ake v. Oklahoma***, 470 U.S. 68, 76-77, 105 S.Ct. 1087 (1985). ***See generally, Foster v. California***, 394 U.S. 440, 89 S.Ct. 1127 (1969); ***Rogers v. Richmond***, 365 U.S. 534, 81 S.Ct. 735 (1961); ***Napue v. Illinois***, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959); ***Dispensa v. Lynaugh***, 847 F.2d 211, 218 (5th Cir. 1988); ***and, Ex parte Brandley***, 781 S.W.2d 886 (Tex.Cr.App. 1989). The Court of Criminal Appeals has held so as well. ***Brown v. State***, 977 S.W.2d 328, 333 (Tex.Cr.App. 1996) (Keller, J., concurring); ***Reese v. State***, 977 S.W.2d 328, 333 (Tex.Cr.App. 1994); ***and***,

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39. And the burden placed upon authorities to provide such information is no real burden. Indeed, under Tex. Crim. Proc. art. 26.13 (4) the trial judge is required to admonish any defendant that "the fact that the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." Surely a requirement that law enforcement officers advise a foreign nation of the right to contact a Consular is no more burdensome than that burden the Legislature placed on the Courts in art. 26.13.

Cook v. State, 940 S.W.2d 623, 630 (Tex.Cr.App. 1996) (Baird, J., concurring and dissenting).

Applicant would respectfully show this Court that the State, by securing a conviction and death sentence with evidence obtained in violation of the Vienna Convention on Consular Relations, rendered the proceedings herein "fundamentally unfair."

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No. 06-984

FILED
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SUPREME COURT, U.S.

In The Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

STATE OF TEXAS

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF AMICI CURIAE THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-seven Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).[2] Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.[3]

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Global consent letters from all parties for all *amicus curiae* briefs are on file with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director and Matthew Cross, Assistant, International Justice Project.

[2] Vienna Convention on Consular Relations, 21 U.S. Treaties 77, 596 U.N.T.S. 261 (1963).

[3] Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty*, *at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases. See, also European Union, *Guidelines to EU*

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in promoting general compliance with international instruments.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

The Council of Europe,[4] Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article

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Policy Towards Third Countries on the Death Penalty (June 3, 1998), Part III(v) *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

[4] The Council of Europe is composed of 47 Member States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been affirmed by the International Court of Justice (ICJ).[5] Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 171 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations. Its conclusion is regarded as "the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether

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[5] *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. Reps. 466 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. Reps. 12 (Mar. 31).

by treaty or national legislation, without reference or recourse to the Vienna Convention."[6]

The ICJ is "the principal judicial organ of the United Nations" (U.N.).[7] The Court's Statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.[8]

The United States[9] and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are assured access to consular officers and through them to others."[10]

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[6] LUKE LEE, CONSULAR LAW AND PRACTICE at 26 (2d. ed. 1991).

[7] U.N. Charter, 59 Stat. 1031, T.S. No. 993, Article 92 (1945); Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

[8] U.N. Charter, Article 93, para. 1.

[9] The United States ratified the U.N. Charter on August 8, 1945.

[10] U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign nationals and consuls of the Sending State. Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. It expressly includes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."[11] The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".[12]

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals

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[11] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).
[12] *Id.* para 123.

require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence.

II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*[13] and in *Sanchez-Llamas v. Oregon*[14] that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and "[m]oreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposed such action.' The clarity of these provisions, viewed in their context, admits of no doubt."[15]

III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full

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[13] *Breard v. Greene*, 523 U.S. 371, 376 (1998).
[14] *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2677–2678 (2006).
[15] *LaGrand (F.R.G. v U.S.)*, 2001 I.C.J. Reps. 466 (Jun. 27), para 77.

effect to be given to the purposes for which the rights accorded under this Article are intended."[16]

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals*.[17] Rejecting a contrary argument, the Court stated that: "Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also the rights of the detained individual".[18]

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."[19]

The ICJ subsequently affirmed in *Avena* the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is

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[16] VCCR, Article 36, para. 2.

[17] *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. Reps 12 (Mar. 31).

[18] *LaGrand*, para. 89.

[19] *Id.* para. 125.

suited to this task".[20] Contrary to the argument of the US, the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".[21]

IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention."[22]

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[20] *Avena*, para. 140.
[21] *Id.*, para. 143.
[22] *Id.* para. 122.

V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State."[23] The ICJ concluded on the facts of the *LaGrand* case, "[u]nder these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36."[24]

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution."[25]

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[23] *LaGrand*, para. 90.
[24] *Id.* para. 91.
[25] *Avena*, para. 134.

VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation..."[26]

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

While the VCCR is the foundational treaty that regulates consular access, additional treaties, including a number ratified by the United States, incorporate the principle.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires States to punish those who commit torture, provides that a torture suspect who is a foreign national "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national."[27]

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[26] DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

[27] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), 1465 U.N.T.S. 85 (1987).

Similarly, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.[28]

Further, anti-terrorism treaties require consular access if a foreign national is detained on a charge of terrorism. A number of these treaties also include a clause based on VCCR Article 36(2), to require that however consular access is implemented in domestic law, full effect must be given to its purpose.[29]

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolution on The Human Rights of All Migrant Workers and Their Families.[30]

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[28] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973), Article 6, 28 U.S. Treaties 1977. The same provision also features in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 6 (3), 24 U.S. Treaties 564 (1971); Convention for the Suppression of the Unlawful Seizure of Aircraft, Article 6 (3), 22 U.S. Treaties 1641 (1970); Convention on Offences and Certain Other Acts Committed on Board Aircraft, Article 13 (3), 20 U.S. Treaties 2941 (1963).

[29] International Convention for the Suppression of Acts of Nuclear Terrorism, Article 10 (3), (4), U.N. G.A. Res. 59/290 (2005); International Convention for the Suppression of the Financing of Terrorism, Article 9 (3), (4) U.N. G.A. Res. 54/109 (1999); OAU Convention on the Prevention and Combating of Terrorism, Article 7(3), (4) OAU Doc. AHG./Dec.132 (1999); International Convention for the Suppression of Terrorist Bombings, Article 7 (3), (4) 2149 U.N.T.S. 256 (1998); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Article 7 (3), (4) 1678 U.N.T.S. 221 (1988); International Convention against the Taking of Hostages, Article 6 (3), (4) 1316 U.N.T.S. 205 (1979).

[30] *The Human Rights Of All Migrant Workers And Their Families,*

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.[31] In addition, the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.[32] A new treaty, the text of which has been recently adopted by the U.N. General Assembly, the International Convention for the

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AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2027 (XXXIV-O/04), (Resolution adopted at the fourth plenary session, held on June 8, 2004); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2130 (XXXV-O/05), (Resolution adopted at the fourth plenary session, held on June 7, 2005); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2224 (XXXVI-O/06), (Resolution adopted at the fourth plenary session, held on June 6, 2006).

[31] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. G.A. Res. 43/173 (1988); see also the Code of Conduct for Law Enforcement Officials, Art. 2 (Commentary), U.N. G.A. Res. 34/169 (1979).

[32] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. G.A. Res. 40/144 (1985); see also Convention Relating to the Status of Stateless Persons, Art. 16 (3), 360 U.N.T.S. 117 (1954); Convention Relating to the Status of Refugees, Art. 16 (3), 189 U.N.T.S. 137 (1951).

Protection of All Persons from Enforced Disappearance, contains an analogous provision.[33]

The U.N. General Assembly has "reaffirm[ed] emphatically the duty of States parties to the Vienna Convention on Consular Relations of 1963 to ensure full respect for and observance of the Convention, in particular with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own State in the case of detention, and the obligation of the State in whose territory the detention occurs to inform the foreign national of that right."[34]

Further, the U.N. Standard Minimum Rules for the Treatment of Prisoners[35] provides that if a foreign national is arrested, the right of consular access must be respected.

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[33] International Convention for the Protection of All Persons from Enforced Disappearance, Art. 17 (d), U.N. G.A. Res. 61/177 (2006); see also the Declaration on the Protection of All Persons from Enforced Disappearance, Art. 10 (2), U.N. G.A. Res. 47/133 (1992).

[34] Protection of Migrants, U.N.G.A. Res., A/RES/58/190 (Mar.22, 2004), para. 10; also International Convention on the Protection of the Rights of all Migrant Workers and their Families, Art. 16 (7), U.N. G.A. Res. 45/158 (1990).

[35] Standard Minimum Rules for the Treatment of Prisoners, Rule 38(1), adopted Aug. 30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, U.N. E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957); also, U.N. E.S.C. res. 2076 (LXII) (1977).

VII. CONCLUSION

The EU considers the guarantee of the effective right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present case. When notification is omitted and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts."[36]

In light of the international law norms articulated above, the EU, The Council of Europe, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioner.

Respectfully Submitted,

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[36] *Avena*, para. 121.

APPENDIX

STATEMENT OF INTEREST
THE COUNCIL OF EUROPE

The Council of Europe, an international organization composed of 47 European states committed to the rule of law and respect for human rights, associates itself with the *amicus curiae* brief submitted by the European Union in support of Mr. Jose Medellin's appeal before the United States Supreme Court.

It is of the opinion that the right of detained foreign nationals to be informed, without delay, of the right to consular access, as set out in Article 36 of the Vienna Convention on Consular Relations, is an individual right and one which is also protected under customary international law. If a foreign national is convicted without being informed of this right, that individual must be allowed to apply to a court to challenge the conviction and the sentence, in reliance on Article 36, paragraph 1. Courts must conduct such a review even if their procedural rules would otherwise preclude review.

Furthermore, it is of the opinion that respect for judgments of the International Court of Justice by states that are party to litigation is a basic requirement of the rule of law at the international level, as expressed in Article 94 of the United Nations Charter.

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No. 06-984

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF FOREIGN SOVEREIGNS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSÉ ERNESTO MEDELLÍN

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INTEREST OF AMICI CURIAE[1]

The United States is a party to the Vienna Convention on Consular Relations[2] and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.[3] Article 36 of the Convention requires authorities who detain a foreign national to notify the detained person without delay of the right to contact consular officials and requires the authorities, if requested, to notify consular officials of the detention. The Optional Protocol grants enforcement powers to the International Court of Justice ("ICJ") and makes it the compulsory forum for resolving disputes on matters related to the Convention between nations that have adopted the Optional Protocol.

Texas authorities arrested, tried, convicted, and sentenced 18-year-old José Ernesto Medellín without ever providing him the notice required by Article 36, even though Medellín told those authorities, when they first arrested him, that he was born in Mexico. Mexico commenced the *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. U.S.*) (Order of March 31, 2004), *available at* http://www.icj-cij.org/ [hereinafter "*Avena*"], to seek redress for the Texas authorities' actions in Medellín's case and for various U.S.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and Respondent have consented in writing to the filing of this brief *amicus curiae*. The text of this brief is similar to the brief submitted by various foreign sovereign *amici curiae* in this Court on January 24, 2005 in *Medellín v. Dretke*, No. 04-5928. Although further proceedings related to Mr. Medellín's conviction and sentence have taken place since January 24, 2005, the foreign sovereigns joining the instant brief as *amici curiae* have the same position as they did in the earlier action.

[2] April 24, 1963, 21 U.S.T. 77 [hereinafter "Vienna Convention" or the "Convention"].

[3] April 24, 1963, 21 U.S.T. 325 [hereinafter "Optional Protocol"].

state authorities' similar failures to notify Mexican nationals about their rights in 53 other capital cases. The ICJ ruled that Texas authorities violated Article 36 in Medellín's case by not notifying him about the right to speak with a consul once they had reason to believe he was a Mexican national. In Medellín's case, as in the 50 other instances where it found Article 36 violations, the ICJ ordered U.S. courts to review his conviction to determine, without regard to procedural default doctrines, the violation's effect on the proceedings that led to his death sentence.[4] Now, Medellín asks this Court to determine whether U.S. courts must follow *Avena*.

Amici nations have an immediate interest in Medellín's case. Each *amicus* has adopted the Convention and each has a vital interest in seeing that U.S. law-enforcement authorities comply with the Convention and furnish a legal remedy for treaty violations. *Amici* have thousands of their nationals present in the United States and must ensure that those nationals receive the consular protection and support envisaged by Article 36. *Amici*, through their consuls in the United States, rely on the notice provisions in Article 36 to ensure that *amici* can provide speedy and effective assistance when federal, state, or local authorities detain one of their nationals. Without notice under Article 36, detained nationals often lose the benefit of consular assistance in criminal proceedings.

When U.S. authorities violate the Convention, *amici* have a further interest in seeing that U.S. courts apply a remedy that restores the benefits of Article 36, because consular intervention can affect the outcome of criminal proceedings. Consuls have an obligation to assist and ensure fair treatment of their nationals who become entangled in another state's criminal-justice system. In death-penalty cases, consuls can

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[4] In *Avena*, the Mexican government sought relief for 54 nationals convicted in capital cases. The ICJ held that authorities in the United States violated Article 36 in 51 of those cases. *Avena*, ¶¶ 106(1)-(2); 153(4).

assist in obtaining mitigating evidence from the home country; the accused might otherwise lack access to such evidence. Several *amici* have nationals on death row in the United States.[5] Because of the death penalty's severity, these *amici* have a particular interest in ensuring that nationals on death row receive redress for any prejudicial effect that a treaty violation had on their defense.

More generally, *amici* nations have an interest in reciprocal compliance with international obligations. This includes abiding by the ICJ's judgments if a country has agreed by treaty to do so. In this case, the United States signed the Optional Protocol, which requires compliance with the ICJ's judgment in *Avena*. The ICJ can function effectively as a forum for peacefully resolving disputes only if *all nations* abide by its judgments in cases where they have a treaty-based obligation to comply. The reciprocity principle applies equally to the consular system codified in the Vienna Convention. In the long term, countries will not provide foreign nationals with consular notice under the Convention if the same protection is not accorded to their own citizens abroad.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the past, the United States has formally protested detention of its nationals without consular notice, even when the detention lasted for only 32 hours.[6] Then as now, the United States recognized that a consul may provide critical assistance to nationals detained in another country's criminal-justice system. Vienna Convention Article 36 makes that assistance

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[5] The Death Penalty Information Center lists on its website each country that has a national on a U.S. death row and the total number of nationals on death row for each of those countries. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States* (last modified July 15, 2004), *at* http://www.deathpenaltyinfo.org/.

[6] *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145-49 (2d ed. 1991) [hereinafter "CONSULAR LAW"].

possible by requiring that local authorities notify the detained person of the right to speak with a consul. Such notice can affect the outcome of criminal proceedings. Consular assistance may take many forms, including helping to select counsel, urging prosecuting authorities to seek a reduced penalty, collecting evidence (including substantial mitigating evidence) from the home country, and monitoring proceedings.

This Court should reverse the Texas Court of Criminal Appeals' judgment and remand the case for further review in accordance with the *Avena* judgment for several reasons. First, the pattern of treaty violations by local authorities in the United States, which deprives foreign defendants of consular assistance, establishes a dangerous precedent, because Article 36's vitality worldwide depends on reciprocity. If jurisdictions in the United States continue to deny detained foreign nationals notice under Article 36, and if U.S. courts fail to provide a remedy for that denial, other nations may follow suit. As the United States Department of State has recognized in its guidelines to local authorities, vigorous domestic adherence to Article 36 helps guarantee that U.S. nationals will receive the same treatment abroad. The United States insists on consular notice for its citizens when authorities in other countries detain them, and it has protested denial of, or minor delays in, consular access or notice.

Second, the ICJ's *Avena* judgment now requires U.S. courts to consider the effect of the treaty violation—denying the consular notification the United States insists upon for its own citizens—in Medellin's case. The proceedings that resulted in the *Avena* judgment took place under the Optional Protocol, which selects the ICJ as the compulsory forum for resolving disputes between states that have adopted the Protocol, as both the United States and Mexico have. The Protocol's plain language requires adherence to the ICJ's judgment.

Third, the United States should adhere to the ICJ judgment for another reason: the United States uses the ICJ to air

international grievances. The United States has commenced ten cases before the ICJ.[7] Most significantly, after the take-over of its Tehran embassy in 1979, the United States commenced the first action ever to invoke the ICJ's compulsory jurisdiction under the Optional Protocol. In that case, the United States obtained a favorable judgment ordering Iranian compliance with the Vienna Convention. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* (May 24), 1980 I.C.J. 3, ¶ 95 (emphasis added) [hereinafter "*Diplomatic and Consular Staff*"]. When Iran failed to comply with the judgment, the United States condemned Iran's "contempt" of the ICJ.[8] Adherence to the rule of law requires U.S. compliance with the Vienna Convention and *Avena*.

ARGUMENT

I. THE VIENNA CONVENTION AFFORDS VITAL PROTECTION TO INDIVIDUALS, INCLUDING U.S. CITIZENS, WHO TRAVEL OR RESIDE OUTSIDE THEIR HOME COUNTRY.

Although consular relations have existed since ancient times, the Vienna Convention provided the first multilateral codification of a consular system. Member states established the Convention to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." Vienna Convention, Preamble. The United States Senate unanimously ratified the Vienna Convention and the Optional Protocol on October 22, 1969. 115 Cong. Rec. S30, 953, S30, 997 (daily ed. Oct. 22, 1969). The hearings on ratifying the Convention record the Senate's understanding that the Convention would preempt any conflicting state or federal laws. *See* William J. Aceves,

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[7] *See* http://www.icj-cij.org/icjwww/idecisions.htm.

[8] *Muskie Issues a Plea on Hostages*, THE NEW YORK TIMES, Aug. 30, 1980, at A3.

The Vienna Convention On Consular Relations: A Study Of Rights, Wrongs, And Remedies, 31 VAND. J. TRANSNAT'L L. 257, 267-68 (1998). J. Edward Lyerly, the Deputy Legal Advisor for the Nixon Administration, testified before the Foreign Relations Committee that "'to the extent that there are conflicts in Federal legislation or state laws[,] the Vienna Convention, after ratification, would govern. . . .'" *Id.* at 268.

A. The Convention, including Article 36, codifies the consular system on which member nations rely to ensure their citizens' fair treatment when abroad.

The ICJ described consular relations' importance in its interim order in the Iran hostage-taking case:

> [T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and *ensuring the protection and assistance for aliens resident in the territories of other states.*

Diplomatic and Consular Staff, ¶ 40 (emphasis added). Article 5(e) of the Convention lists numerous consular functions and includes within that list the functions most pertinent to this case: "helping and assisting nationals, both individuals and bodies corporate, of the sending state."

To that end, the Convention recognizes the importance of consular communication in situations where authorities in one member country detain a national of another member country. In that event, Article 36(1) requires the detaining authorities to take each of the following steps: (1) permit communication between a consul and a detained national; (2) notify a detained person "without delay" of his or her right to speak with a consul; and (3) upon request, notify the consul of the national's detention. The State Department has recognized

on multiple occasions that notification serves an "essential" function in protecting nationals who travel to foreign countries. 7 FOREIGN AFFAIRS MANUAL § 411 (1984).[9]

> [O]ne of the basic functions of a consular officer is to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Id., § 401; *see* 7 FOREIGN AFFAIRS MANUAL § 410 (2004).[10] Article 36 exists to ensure that consular officials will have a real, not merely hypothetical, opportunity to act as a "cultural bridge" for their nationals. Detained individuals unschooled in foreign affairs matters often would not know to request communication with their consul. The Convention thus obligates states to notify persons of that right.

B. With proper notice, a consul can provide a detained national a wide array of assistance that can affect—and actually has affected—the outcome of criminal proceedings.

"Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." CONSULAR LAW at 145 (quoting U.S. DEP'T. OF STATE, TELEGRAM 40298 TO EMBASSY DAMASCUS, Feb. 21, 1975). "To minimize the disadvantages experienced by accused foreigners, international law guarantees the right of consular access." S. A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to Consul*, 26 ST. MARY'S L.J. 719, 721 (1995). The Foreign Affairs Manual—

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[9] *Available at* http://web.archive.org/web/20040301104701/foia.state.gov/REGS/fams.asp? level=2&id=8&fam=0.

[10] *Available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0.

the State Department's own instructions to United States consular officers—recognizes the consul's role in helping a detainee understand the unfamiliar criminal-justice system that he or she must navigate. 7 FOREIGN AFFAIRS MANUAL §§ 400-426.2-1 (2004).

Consular assistance in navigating a foreign judicial system may take many forms. First, consular officials can help the detained national in selecting counsel, and in some cases, may even recruit pro bono counsel. The United States, Mexico, and the United Kingdom have specific guidelines for their consuls to assist nationals in obtaining counsel. CONSULAR LAW, at 125, 127 & 166. These published instructions typify the practices followed by many nations. In one case, Mexican consular officials in Houston helped secure *pro bono* representation after trial from the firm Vinson & Elkins for Ricardo Aldape, a Mexican national sentenced to death in Texas. The firm's efforts exposed intimidation and manipulation of witnesses "calculated to obtain a conviction" despite "the lack of evidence pointing to [Aldape's]" guilt. *Note: Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. LAW 359, 372 (2003) (quoting *Guerra v. Collins*, 916 F. Supp. 2d 620, 637-38 (S.D. Tex. 1995)) [hereinafter "*Reciprocity Unmasked*"]. Aldape prevailed in habeas corpus proceedings, and prosecutors decided not to try him again, so he was released and returned to Mexico. "[T]he attorney that handled the case noted that 'without the Mexican consul's involvement, I have no doubt that [Aldape] would never have been released.'" *Id.* at 373-74. The Mexican government also participated extensively in the case of Osbaldo Torres, one of the individuals covered by the *Avena* judgment. The Mexican government took many actions to assist Torres: Mexico's ambassador to the United States spoke at Torres's clemency hearing, Mexico filed an *amicus* brief in the Oklahoma Court of Criminal Appeals, and Mexican President

Vicente Fox personally urged Oklahoma Governor Brad Henry to delay the execution.[11] Governor Henry ultimately commuted Torres's sentence to life in prison.[12]

Second, prior to trial, consular officials may address the prosecuting authorities regarding the case. In capital cases, this may include presenting reasons for the prosecutor not to seek the death penalty, such as mitigating evidence, criminal history (or lack thereof), and the accused's personal circumstances. Missing the chance to present this evidence, which may be located in the home country and thus inaccessible to domestic counsel, significantly increases the foreign national's chance of a death sentence because prosecutors more often than not will decide against seeking the death penalty when faced with substantial mitigating evidence. Shank & Quigley, at 740; *see also McKleskey v. Kemp*, 481 U.S. 279, 307 n.28 (1987) ("[T]he strength of the available evidence . . . may influence a prosecutor's decision to offer a plea bargain or go to trial.").

Third, the consul may help collect evidence for use at trial and, in death-penalty cases, during the penalty phase. Because mitigating evidence may exist in the national's home country rather than in the place of the trial, consuls can provide invaluable assistance in collecting that evidence. *See Reciprocity Unmasked,* at 368 (describing how Mexican officials collected evidence of a defendant's diminished mental capacity from his home town and with that evidence, helped reduce his sentence from death to life in prison); *Note: Strangers in a Strange Land: Assessing the Fate of Foreign*

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[11] Associated Press, *Death Penalty Opponents Urge Clemency for Torres*, May 12, 2004, *available at* http://ocadp.org/news/2004/torres/opponents_urge.html.

[12] Mexican Secreteriat of Foreign Relations, Press Release No. 106, *Osvaldo Torres' Execution in Oklahoma is Suspended, available at* http://www.sre.gob.mx/eua/English/Press/Release/2004/May/SRETorresCourt.pdf.

Nationals Arrested in the United States by State and Local Authorities, 78 MINN. L. REV. 771, 772-73 n.6 (1994) (referring to guidelines requiring a Canadian consul "to obtain case related information" on behalf of charged nationals).

Fourth, consuls monitor proceedings involving their nationals as a matter of course to ensure fairness and compliance with international standards. Several countries publish specific guidelines for this monitoring. The State Department's guidelines require its consuls to attend any U.S. national's trial, protest any discrimination, and monitor the well-being of incarcerated citizens. CONSULAR LAW, at 169-71 The United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prime-facie miscarriage or denial of justice" or "when appeal to a higher authority would obviously be futile." *Id.* at 125. The potential for discrimination against a foreign national makes consular monitoring particularly important in capital cases. Shank & Quigley, at 741.

Furthermore, consuls can provide assistance beyond the four major categories listed here. For instance, Mexico historically has actively assisted its nationals in U.S. criminal proceedings and in 2000 formed the Mexican Capital Legal Assistance Program. *See Reciprocity Unmasked*, at 393-94. As described above, Mexico's intervention resulted in the outright release of Ricardo Aldape and averted death sentences in three other Mexican nationals' cases. *Id.* at 368-74. None of this vital assistance can occur absent compliance with Article 36 of the Vienna Convention.

II. THE CONTINUED VIABILITY OF ARTICLE 36 DEPENDS ON RECIPROCITY AMONG NATIONS.

This Court long ago recognized that "international law obligations are of necessity reciprocal in nature" and that "what is law for one is, under the same circumstances, law for

the other." *United States v. Arjona*, 120 U.S. 479, 487 (1887). International law and United States' foreign-relations law follow the cardinal rule that treaties must be observed (*pacta sunt servanda*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §321 cmt. a. "[T]he doctrine of *pacta sunt servanda* . . . lies at the core of the law of international agreements and is perhaps the most important principle of international law." *Id.* "It includes the implication that international obligations survive restrictions imposed by domestic law." *Id.*; U.S. CONST. art. VI, cl. 2 (international treaties preempt conflicting state law under the Supremacy Clause). When one state fails to comply with its treaty obligation, it influences others to do the same. As Justice Brandeis observed, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

A. The United States insists on Article 36's protections for its nationals abroad.

Beginning with the Vienna Convention itself, the United States historically has recognized the importance of Article 36, a position that makes the United States' reciprocal compliance with Article 36 particularly critical. At the Vienna Convention, the U.S. delegation stated that "no country could disregard its obligation in certain circumstances to inform consuls of the sending state of the arrest of its nationals." LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 111 (1966). Indeed, it was the United States, along with several other countries, that sponsored the amendment that ultimately became Article 36. *Id.* at 113. The Unites States has taken the position that Article 36 created "'[o]bligations of the highest order'" that require notification "as quickly as possible and, in any event, no later than the passage of *a few days*." ARTHUR W. ROVINE, DEP'T.

OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 161 (1973) (emphasis added).

The United States' insistence on consular notice has extended to specific cases involving its nationals in other countries. When the Syrian government detained two American citizens, the State Department chastised it for failing to provide consular notice in accordance with bilateral treaties and customary international law:

> The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations . . . .

CONSULAR LAW, at 145 (quoting TELEGRAM 40298). The same document emphasized the importance of reciprocity: "The recognition of these rights is prompted in part by considerations of reciprocity. . . . The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals." *Id.*

The State Department also protested the alleged violation of Article 36 by foreign authorities who detained two Americans, even though the authorities released the Americans after 32 hours. The United States considered the principle of complying with Article 36 so important that it actually lodged the protest *after* release, asking a senior minister of the detaining country to "elaborate expeditiously" as to "[w]hy the . . . two United States citizens were not informed of their right to contact the Consulate as provided under [A]rticle 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States Citizens until approximately 28 hours afterward." CONSULAR LAW, at 149. In that instance, the detaining authorities released the indi-

viduals in less than two days and gave notice to the U.S. consulate. In contrast to that relatively rapid action, Texas arrested, tried, convicted, and sentenced 18-year-old Medellín to death, and then allowed him to remain on death row during appellate proceedings, without ever notifying the Mexican consulate or telling Medellín that he had the right to contact the consulate. Medellín learned about his right to contact the consulate four years after his arrest, when he was already on death row.

The State Department's actions and statements leave no doubt about the importance that the United States places on rapid consular notification when foreign authorities detain Americans. In fact, the State Department *requires* consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. 7 FOREIGN AFFAIRS MANUAL § 426.2-1 (2004). But, as the State Department has also recognized, the United States can expect swift notification only in an environment of reciprocity.

B. Texas's treaty violation has international repercussions.

Texas's treaty violation in Medellín's case and the courts' failure to provide a remedy for that violation create a dangerous legal precedent, particularly because those failures fit an ongoing pattern of violations by Texas and other states.[13] Other nations may follow the United States' practice by disregarding Article 36's notice requirement and by failing to offer any remedy for its violation. The State Department's own instructions to U.S. law-enforcement authorities regarding consular notification recognize this danger:

> The Department of State appreciates the continued cooperation of federal, state, and local law enforcement

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[13] *See Avena*, ¶ 106 (listing 51 cases in which various U.S. jurisdictions violated Article 36).

> agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. *Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.*

U.S. DEP'T. OF STATE, CONSULAR NOTIFICATION AND ACCESS 13 (2003) (emphasis added).[14] Reciprocity provides the underpinning for Article 36 and international law generally. To benefit from Article 36 when its citizens travel abroad, the United States must adhere to it domestically.

III. THE UNITED STATES MUST FOLLOW THE ICJ'S *AVENA* JUDGMENT, WHICH SPECIFICALLY ADDRESSES THE MEDELLÍN CASE.

The United States has adopted the Optional Protocol, which makes the ICJ the authoritative interpreter of the Vienna Convention and gives the ICJ compulsory jurisdiction over any disputes involving the Convention. Optional Protocol, Art. 1. Mexico invoked that jurisdiction in the *Avena* case to resolve its claims against the United States for violating Article 36 in 54 specific instances, including Medellín's case. The ICJ issued a judgment that requires judicial review of Medellín's case to determine whether Texas's treaty violation prejudiced Medellín's defense. *Avena*, ¶¶ 121, 139. Under the Optional Protocol, the ICJ's decision binds U.S. courts, which must conduct the review ordered in *Avena*.

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[14] *Available at* http://travel.state.gov/law/CNA_book.pdf.

A. The United States proposed, advocated for, and joined the Optional Protocol, which establishes the ICJ as authoritative interpreter of the Convention.

The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, Art. 1. International law and United States foreign-relations law require domestic courts to follow the Optional Protocol's plain text and to accept the ICJ's interpretations as binding. RESTATEMENT, § 321 cmt. a. These obligations bind not only the national government, but also any political subdivisions, including the states. *See* Aceves, at 267-68. The U.S. Constitution's Supremacy Clause codifies this principle into domestic law by giving preemptive force to ratified treaties. U.S. CONST., art. VI, cl. 2; *Wildenhus's Case*, 120 U.S. 1, 17 (1887).

The United States understood the Optional Protocol's unambiguous terms when it adopted the Protocol. The United States proposed the original text that, in modified form, became Article 1 of the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at pp. 72-73. And the United States acted as one of the Optional Protocol's strongest advocates at the Vienna Convention, successfully defeating any efforts to diminish the compulsory jurisdiction that the Protocol conferred on the ICJ. *Id.* By adopting the Optional Protocol, the federal government made it "part of the Supreme law of the United States," and Texas must therefore give the Protocol "force and effect." *Wildenhus's Case*, 120 U.S. at 17.

B. *Avena* requires U.S. courts to review—without resorting to procedural default doctrines—the effect that Texas's treaty violation had on Medellin's defense.

Mexico's application instituted ICJ proceedings against the United States under the Optional Protocol for "violations of the Vienna Convention on Consular Relations," in connection with the cases of 54 Mexican nationals, including Medellín. *Avena*, ¶ 1. In addition to seeking declarations that denying consular notice under Article 36 violated international law, Mexico asked the ICJ for relief that would "restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations." *Id.*, ¶ 14(5). The United States participated fully in the *Avena* proceedings.

When it reached the merits, the ICJ determined that local authorities in the United States had violated Article 36 in 51 cases, including Medellín's case. *Id.*, ¶¶ 106, 114. But the ICJ did not order the *status quo* restoration sought by Mexico. Rather, the ICJ ordered a more limited remedy, requiring judicial review and reconsideration of the Mexican nationals' sentences by "tak[ing] account of the violation of the rights set forth in the Convention and guarantee[ing] that the violation and the possible prejudice caused by that violation will be fully examined." *Id.*, ¶ 138 (citations omitted). The ICJ judgment precludes application of "procedural default" as a bar to substantive review and requires "review and reconsideration . . . both of the sentence and of the conviction." *Id.*, ¶¶ 131-39. "[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to violation of the rights set forth in the Vienna Convention . . . ." *Id.*, ¶ 139. Because the *Avena* judgment directly addresses Medellín's

case, the Optional Protocol binds U.S. courts to follow that judgment.

The full consideration and U.S. participation that preceded the ICJ's issuing its *Avena* decision distinguishes this case's circumstances from this Court's earlier decisions in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (*per curiam*) and *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*). In those instances, Germany and Paraguay had filed ICJ actions just days or hours before scheduled executions and then asked this Court to stop those executions based on provisional stay orders that the ICJ issued immediately after the cases were filed. *Federal Republic of Germany*, 526 U.S. at 111-12; *Breard*, 523 U.S. at 374. In both instances, this Court made particular note of the tardiness in seeking relief, and the United States contended that the ICJ's provisional orders were not binding. *See* William J. Aceves, *International Decision: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924, 926 n.16 (1999). In Medellín's case, the plea is not tardy, because the ICJ decided *Avena* long before his scheduled execution and he raised *Avena* as grounds for relief in the Court of Appeals. *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).[15] Unlike the ICJ orders at issue in *Federal Republic of Germany* and *Breard*, the United States has never argued that the ICJ's final judgment in *Avena* is not binding. Denying Medellín the remedy ordered in *Avena*—substantive review of the effect that Texas's treaty violation had upon his defense—would amount to contumacy of a fully considered ICJ judgment and would compound the original international-law violation that

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[15] Although the ICJ had not yet issued its *Avena* decision at the time, Medellín raised the Texas authorities' Vienna Convention violation as a ground for relief in the district court, citing the ICJ's final decision in the case that was the basis for this Court's decision in *Federal Republic of Germany*. *Id.*

occurred when Texas authorities violated Article 36. *See* Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT'L L. 341, 343 (2001) ("International law includes not only norms regarding substantive conduct, but also binding remedial norms. The remedial norms are important.").

C. The United Nations Charter requires the United States to comply with ICJ judgments.

The United States has ratified the United Nations charter, a multilateral treaty. Charter of the United Nations, June 26, 1945, 59 Stat. 1031 [hereinafter "U.N. Charter"]. The U.N. Charter establishes the ICJ as the United Nations' "principal judicial organ," and "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, Art. 92, 94. By adopting Article 94 of the U.N. Charter, the United States has "transferr[ed] adjudicatory authority to the U.N. and its organs," and attributes "binding legal force to their decisions." Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS INT'L & COMP. L. REV. 27, 50 (1999). Furthermore, Article 93 of the U.N. Charter makes all U.N. members parties to the Statute of the International Court of Justice; the United States ratified the ICJ Statute in conjunction with the U.N. Charter. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 [hereinafter "ICJ Statute"]. The ICJ Statute, in turn, further reaffirms an ICJ judgment's "binding force" as between the parties to an ICJ case. ICJ Statute, Art. 59, 60. Like the Optional Protocol, the U.N. Charter and the ICJ Statute require the United States to comply with *Avena*, a case to which the United States was a party.

CONCLUSION

Medellín's case presents questions of urgent national and international importance. The United States relies on Vienna Convention Article 36 to protect its nationals in foreign countries, but the continued viability of Article 36 depends on reciprocal adherence to its mandates. A pattern of denying consular notification has emerged in local U.S. jurisdictions, and only a judicial remedy for those violations can ensure continuing compliance with Article 36 around the world. Moreover, the ICJ, which had compulsory jurisdiction over Mexico's claim against the United States for violating Article 36, issued an order requiring U.S. courts to review the violation in Medellín's case to determine the effect it had on his defense. Compliance with the ICJ's judgment will reinforce the rule of law, which the United States so forcefully advocates around the world.

For all the reasons stated in this Brief, this Court should reverse the Texas Court of Criminal Appeals' judgment and remand the case with instructions to apply *Avena* as the rule of decision.

Respectfully submitted,

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No. 06-984

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF FORMER UNITED STATES DIPLOMATS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae have served as senior State Department officials, ambassadors, and legal advisers, representing the government of the United States at home and abroad in both Republican and Democratic administrations.[2] *Amici* seek to present their views on the important issues raised by this case in light of this Court's recognition that the "opinions of senior National Government officials are competent and direct evidence of the frustration of [national] objectives by" the acts of a state government. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 385 (2000).

Amici vary widely in their views regarding the scope of executive authority under the U.S. Constitution and the merits of the International Court of Justice's interpretations of the Vienna Convention in its ruling in *Case Concerning*

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] *Amici*, who also previously filed an amicus brief in support of Petitioner in *Medellin v. Dretke* (No. 04-5928), include: former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former Under Secretary of State Thomas R. Pickering, former ambassadors Stephen W. Bosworth, Jeffrey Davidow, James R. Jones, J. Stapleton Roy, Wendy Sherman, Nancy Soderberg, Malcolm R. Wilkey, and Frank G. Wisner, former Legal Advisers Herbert J. Hansell and Abraham D. Sofaer, and Special Presidential Envoy James C. O'Brien. Of their number, four have retired with the rank of Career Ambassador, the highest rank that can be conferred upon members of the United States Foreign Service. Ambassador Wilkey and Legal Adviser Sofaer were formerly federal judges, on the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the Southern District of New York, respectively. *Amici* appear in their personal capacities; their current affiliations are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions presented. A comprehensive list of the qualifications of *amici* appears in the Addendum to this brief.

Avena & Other Mexican Nationals (Mex. v. U.S.), No. 128, 2004 I.C.J. 12 (Mar. 31, 2004). *Amici* also vary widely in their views regarding whether the death penalty can ever be lawfully administered and do not express any opinion on the appropriate resolution, after review and reconsideration, of Petitioner's challenge to his conviction and sentence. But all *amici* agree, first, that the United States is obliged to abide by International Court of Justice ("ICJ") decisions, such as *Avena*, that were rendered while the United States was a party to the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol]; second, that the President has the constitutional authority to enforce that international obligation, particularly where, as here, the Senate has authorized him to do so through multiple treaties; and third, that allowing the Texas courts to disregard the nation's treaty commitments and the President's considered determination that state courts should give effect to the *Avena* decision would significantly impair the credibility of American diplomats in the international arena.

Amici believe that "[g]reat nations, like great men [and women], should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court should reverse the decision below, which cannot be squared with the Supremacy Clause of the U.S. Constitution, past precedents of this Court, orderly maintenance of our diplomatic relations and sovereign commitments, and critical U.S. interests that are governed by other treaty regimes.

SUMMARY OF ARGUMENT

In January 2003, the Mexican government brought suit against the United States in the ICJ under the Optional Protocol, to which both Mexico and the United States were

then parties.[3] The suit alleged that the United States had violated the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention], in the case of Petitioner Jose Ernesto Medellin, among others.[4] After full briefing and oral argument, on March 31, 2004, the ICJ issued a final judgment holding that the United States had violated the Vienna Convention by failing to inform fifty-one identified Mexican nationals, including Petitioner, "of their rights" under the Convention and determining that the United States should "allow the review and reconsideration of [the nationals'] conviction[s] and sentence[s] by taking account of the violation of the rights set forth in the Convention." *Avena*, 2004 I.C.J. at 59.

On February 28, 2005, acting through a memorandum to the Attorney General (the "*Avena* Directive"), President George W. Bush determined that the United States would comply with its international obligation to give effect to the ICJ's decision by granting the fifty-one identified Mexican nationals review and reconsideration in the state courts.

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[3] The Optional Protocol provides that any disputes "arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, *supra*, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. On March 7, 2005, shortly after the President issued the directive at issue in this case, the United States gave notice of its withdrawal from the Optional Protocol. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2675 (2006).

[4] The Vienna Convention requires all state parties, including the United States, to inform "without delay" any detained foreign national of his right to request assistance from the consul of his own nation and, if the national so requests, to inform "without delay" the consular office of that national's detention or arrest. *Id.* art. 36. Notwithstanding these obligations, Texas authorities arrested, tried, convicted, and sentenced to death Petitioner Jose Ernesto Medellin – a Mexican national – without informing him of his right to seek assistance from the Mexican Consulate.

Petitioner attempted to secure review in the Texas courts, but the Court of Criminal Appeals refused to give effect to either the *Avena* directive (which it believed exceeded the President's powers) or the *Avena* decision.

Amici submit that the Texas Court of Criminal Appeals erred in three ways. First, the court's ruling improperly flouted the *Avena* Directive, a valid presidential order issued pursuant to multiple treaties and binding on state courts under the Supremacy Clause. In directing compliance with the ICJ's judgment, the President acted pursuant to three interconnected treaties previously made by his predecessors with the advice and consent of the Senate—the Vienna Convention, the Optional Protocol, and the United Nations Charter (together with the annexed ICJ Statute). The *Avena* Directive fell squarely within the President's well-settled constitutional authority to resolve disputes with other nations pursuant to congressional mandate. In a line of cases dating back seventy years, this Court has held that the States are bound when the President settles disputes with foreign nations by entering executive agreements that resolve individual claims, especially when those agreements have been approved by Congress as a whole or by the Senate, exercising its advice and consent authority. *A fortiori*, the States must be bound when the President exercises the specific authority of resolving a particular international dispute by implementing the specific terms of an ICJ ruling issued under the authority of three Senate-approved treaties.

Second, even without an explicit presidential action implementing specific treaty obligations, the Texas court's ruling independently violated the terms of ratified U.S. treaties which, by their own force, also bind the several States. From the Founding until the present, U.S. diplomats charged with carrying out important foreign policy objectives have depended upon the federal government's ability to enforce the nation's treaty obligations. In drafting the Constitution, the Framers sought to avoid the failings of the Articles of Confederation by ensuring that the federal

government had authority to bind the entire nation, including the individual States, to our international commitments. By violating ratified treaties, the decision of the Texas Court of Criminal Appeals in this case offends the Framers' constitutional vision and promotes precisely the kind of diplomatic failure that originally prompted the creation of the treaty power.

Third, the decision below disrupts not just the proper allocation of constitutional power, but also the sound conduct of U.S. foreign policy. Left undisturbed, the state court's ruling will damage the United States' diplomatic credibility and jeopardize its global reputation as a dependable treaty partner. The lower court's ruling thus undermines important foreign policy interests embedded in treaties and threatens our nation's capacity to participate effectively in other treaty regimes. As American diplomats, *amici* have pursued and secured treaty arrangements that confer jurisdiction upon the ICJ and other international dispute-settlement bodies, arrangements that will inevitably multiply as American interests grow more global. The United States can neither build nor benefit from such arrangements if States and localities are free to ignore considered presidential directives and to violate ratified treaties.

ARGUMENT

I. TEXAS MUST COMPLY WITH THE PRESIDENT'S DIRECTIVE THAT STATE COURTS GIVE EFFECT TO THE ICJ'S *AVENA* DECISION

In determining that the United States has an "international obligation[]" to comply with the ICJ's *Avena* decision, and that this obligation should be discharged "by having state courts give effect to th[at] decision," Pet. App. 187a, the President acted pursuant to three treaties previously ratified by the Senate—the United Nations Charter (with its annexed ICJ Statute), the Vienna Convention, and the

Optional Protocol.[5] These treaties operate together to impose upon the United States (and its treaty partners) the obligation to comply with ICJ decisions in "[d]isputes," such as *Avena*, "arising out of the interpretation or application of the [Vienna] Convention." Optional Protocol, *supra*, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. The *Avena* Directive falls squarely within the President's constitutional authority to take those steps he deems necessary to carry out this treaty obligation.

The Constitution specifies not only that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land," U.S. Const. art. VI, but also that it is the President's duty to "take Care that the Laws [including ratified treaties] be faithfully executed," *id.* art. II § 3. The three treaties at issue here impose upon the United States the obligation to comply with the ICJ's judgment in *Avena*, and it follows that the President has the authority to bring the nation, including the several States, into

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[5] In 1945, the United States accepted the duty to comply with ICJ judgments when the Senate advised and consented to ratification, as a treaty under Article II of the Constitution, of the Charter of the United Nations, *entered into force* Oct. 24, 1945, 59 Stat. 1031 [hereinafter U.N. Charter], and the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [hereinafter ICJ Statute], which is annexed to and an integral part of the U.N. Charter. *See* U.N. Charter, *supra*, art. 93(1) (declaring all U.N. Members to be *ipso facto* parties to the ICJ Statute). The ICJ is the "principal judicial organ of the United Nations," *id.* art. 92, and "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party," *id.* art. 94(1). Pursuant to the ICJ Statute, the *Avena* decision has binding force between the United States and Mexico with respect to Petitioner Medellin and the fifty other Mexican nationals named in the ICJ's judgment. *See Avena*, 2004 I.C.J. at 123; ICJ Statute, *supra*, art. 59 (decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added)).

The Vienna Convention and the Optional Protocol were favorably transmitted to the Senate by President Richard Nixon on May 5, 1969, and quickly ratified on October 22, 1969.

compliance. *See, e.g.*, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8–9 (1936) (holding that the President lacks the inherent authority to extradite a U.S. national, but that he may do so on the authority of a treaty); 26 Op. Atty. Gen. 113, 116 (1907) (noting that, "in the absence of any provision by Congress to effect th[e] object" of a treaty, "the President would be authorized and obliged by his duty as executive head of the nation under the Constitution to discharge the obligation [that the treaty imposes] upon the nation").

The *Avena* Directive falls squarely within the President's well-settled constitutional authority to resolve disputes with other nations. In a line of cases dating back seventy years, this Court has held that the President may enter executive agreements to settle disputes with foreign nations involving the claims of particular individuals.

This Court broadly endorsed that power in a pair of cases arising out of President Roosevelt's decision to recognize the Soviet Union. *See United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). In those cases, President Roosevelt had, without involving Congress, entered into a sole executive agreement with the Soviet Union (known as the Litvinov Agreement) that, among other things, recognized the Soviet government's decision to nationalize certain property belonging to Russian citizens, including bank accounts in the United States. The Litvinov Agreement assigned to the United States all of the Soviet Union's claims against U.S. entities arising out of the nationalization. Arguing that the nationalization violated public policy, certain New York banks and the Superintendent of Insurance of the State of New York (who had taken control of some of the affected assets) cited New York law to resist the federal government's effort to recover on assigned Soviet claims. The Court rejected the state officials' argument and held that it "may not be doubted" that "[t]hat the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were

within the competence of the President." *Belmont*, 301 U.S. at 330; *see also Pink*, 315 U.S. at 222–23.

In *Belmont* and *Pink*, the sole executive agreement was specifically authorized by the President's textual Article II authority to recognize foreign governments, and hence overrode New York's efforts to void as against public policy the Soviet nationalization of assets located in the United States. This Court therefore rejected the New York parties' effort to interpose New York law as a bar to recovery of the assets in a legal proceeding and held that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, *state lines disappear.*" *Belmont*, 301 U.S. at 331 (emphasis added and internal citation omitted).

Five years later, in *United States v. Pink*, the Court considered the same argument again and resoundingly reaffirmed its prior conclusion:

> [S]tate law must yield when it is inconsistent with, or impairs the policies or provisions of a treaty or of an international compact or agreement. . . . [The treaty power] need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

315 U.S. at 230–31, 233–34.

One decade after *Pink*, Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* famously explained that the President's authority to act in foreign affairs "is not fixed, but fluctuate[s]," depending upon whether Congress has spoken on the matter at issue.

343 U.S. 579, 635 (1952) (Jackson, J., concurring). When the President's powers are exercised in accordance with expressed or implied authority from Congress, Justice Jackson explained, the executive power is at its zenith, as his action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.* at 637.

Three decades later, in *Dames & Moore v. Regan*, this Court explicitly applied Justice Jackson's *Youngstown* analysis to uphold the legality of a presidential order to implement the terms of an executive agreement resolving claims between the United States and Iran by suspending and transferring to binding arbitration before a newly created Iran-United States Claims Tribunal hundreds of private claims by U.S. nationals pending in American courts. 453 U.S. 654, 663–64 (1981); *see also id.* at 669 (finding Justice Jackson's categories "analytically useful" and holding that executive power in any particular instance falls "at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition"). Writing for the Court, then-Justice Rehnquist relied on congressional acquiescence in the specific presidential action, the existence of general legislation in the area, and a history of unchecked executive practice to conclude that Congress had endorsed the President's initiative, elevating the President's power to its height within *Youngstown*'s three-part framework. *Id.* at 679.[6]

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[6]The Court first found that the International Emergency Economic Powers Act ("IEEPA") specifically authorized the President to liquidate attachments against the Iranian government by U.S. nationals and to require their return to Iran. Although neither the IEEPA nor the so-called Hostage Act explicitly authorized suspension and transfer of private claims from U.S. courts by the Executive Branch, the Court found those statutes "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action" that implied congressional consent. *Id.* at 677.

However many possible stopping points there may be along the spectrum of presidential power, Senate ratification of a treaty clearly falls at one end, as a form of explicit congressional authorization. Ratification eliminates any concern that the Executive Branch is acting at cross-purposes with the Legislative Branch. Thus, under the Court's reasoning in *Dames & Moore*, the long history of executive action to enforce treaty obligations supports presidential action to enforce the judgment of an international tribunal that has been authorized by treaty, even when that action encompasses review of pending claims in U.S. state courts.

Most recently, in *American Insurance Ass'n v. Garamendi*, the Court found that the President's agreement with Germany to refer Holocaust-era insurance claims to an international tribunal for settlement preempted a California law that required insurance companies doing business in California to disclose to the insurance commissioner certain information about Holocaust-era insurance policies. 539 U.S. 396, 420–25 (2003). Preemption was warranted, the Court explained, because the California law clearly conflicted with the express federal policy reflected in enforcing the executive agreement. Under such circumstances, giving effect to California's law would "undercut[] the President's diplomatic discretion and the choice he has made exercising it." *Id.* at 423–24.[7]

In sum, throughout our history, this Court has upheld the presidential exercise—with explicit or tacit congressional approval—of executive power to further diplomatic relations with foreign nations by determining the domestic legal rights of U.S. entities *vis-à-vis* those nations and their citizens. When the claims of private individuals "have become issues in international diplomacy," this Court stated in *Garamendi*,

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[7] *Cf. Pink*, 315 U.S. at 232 ("If state action could defeat or alter our foreign policy, serious consequences might ensue" and "[t]he nation as a whole would be held to answer if a State created difficulties with a foreign power.").

their settlement by the President "may well be just as essential . . . as diplomacy to settle claims against foreign governments." 539 U.S. at 416. This Court has just as consistently affirmed that Executive Branch agreements with foreign governments to resolve disputes that affect claims of specific individuals preempt conflicting state law. *Id.* at 416–17; *see also Pink*, 315 U.S. at 223, 230–31; *Belmont*, 301 U.S. at 327, 331.

In this case, the presidential action rests on even stronger constitutional footing, because, as discussed above, the President issued the *Avena* Directive pursuant to not one, but three, treaties that had been ratified by a two-thirds majority of the Senate—the U.N. Charter with its annexed ICJ Statute, the Vienna Convention, and the Optional Protocol. These treaties, in combination, authorize the ICJ to issue a binding resolution of an interstate dispute arising under the Vienna Convention. When the President took steps to effectuate the ICJ's *Avena* decision pursuant to these multiple layers of legislative authorization, under Justice Jackson's reasoning in *Youngstown*, his executive power stood at its zenith, as his actions were "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U.S. at 871 (Jackson, J., concurring).

Indeed, not only did the President act pursuant to Senate authorization in the form of ratified treaties, but he also issued the *Avena* Directive against a backdrop of prior congressional acquiescence in presidential enforcement of ICJ judgments rendered under those and similar treaties.[8]

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[8] For example, as in the Optional Protocol, the United States agreed in a treaty with Canada that ICJ border determinations would be final and binding. After the ICJ issued one such maritime border resolution, *see Case Concerning Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.)*, No. 67, 1984 I.C.J. 246 (Oct. 12, 1984), the Executive Branch directly enforced the resolution against its own

Significantly, Congress has never objected to this claimed presidential authority to enforce ICJ judgments, thus demonstrating a "history of congressional acquiescence" that further supports the President's claim of authority under these particular treaties. *Dames & Moore*, 453 U.S. at 678.

In attacking the *Avena* Directive, therefore, Texas bears a heavy burden of persuasion, which it cannot carry. The *Avena* Directive intruded upon Texas's state authority only to the minimum extent necessary to fulfill the United States' treaty obligation to comply with the ICJ ruling in *Avena*. The President's February 2005 determination simply repeated the ICJ's requirement that domestic courts review and fully evaluate whether admitted violations of the Vienna Convention had prejudiced the fifty-one identified Mexican nationals in their efforts to defend themselves in criminal proceedings. The President's directive neither directed the state courts how to rule, nor divested them of their traditional judicial authority to resolve the underlying claims of those defendants seeking to overturn their convictions.

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nationals caught fishing in Canadian waters. *See In re Mich. Fishing Corp.*, 6 O.R.W. 380, 1991 WL 288726 (N.O.A.A. May 9, 1991) (imposing $10,000 civil fine for violation of fishing boundary established by ICJ); *In re Makie*, 5 O.R.W. 546, 1989 WL 265326 (N.O.A.A. Aug. 31, 1989) (imposing $5,000 fine for violation of treaty boundary). The Executive Branch also undertook to comply with the ICJ's ruling in the *LaGrand Case* (*F.R.G. v. U.S.*), No. 104, 2001 I.C.J. 466 (June 27, 2001), by advising federal, state, and local officials that the Vienna Convention protocols regarding consular notification were binding law. *Id.* at 511–12 (summarizing actions taken by the Executive Branch). These actions were sufficient to moot Germany's claims for ongoing relief, and have continued. *See, e.g.*, U.S. Dep't of State, Bureau of Consular Affairs, *Consular Notification and Access: Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, pt. 3, Questions About Failure to Notify, *available at* http://www.travel.state.gov/law/consular/consular_748.html#failure (last visited June 27, 2007).

This Court has long held that the Executive Branch has authority to determine whether a treaty remains in force. *See Terlinden v. Ames*, 184 U.S. 270, 285–86 (1902). In *Sanitary District v. United States*, this Court further held that the United States had the authority to sue a State, even in the absence of congressional authorization, to enforce a treaty with Great Britain concerning the level of water in the Great Lakes. 266 U.S. 405, 425–26 (1925). As the Court explained soon thereafter, the Executive has the "right to invoke the aid of a court of equity in removing unlawful [state] obstacles to the fulfillment of its [treaty] obligations." *United States v. Minnesota*, 270 U.S. 181, 194 (1926). If the President has the power to sue a State or local government to force its compliance with the nation's treaty obligations, surely he must also possess the power to require the States to implement a binding ICJ judgment without resorting to disruptive litigation.

II. TEXAS MUST COMPLY WITH TREATY OBLIGATIONS TO GIVE EFFECT TO DECISIONS OF THE ICJ, EVEN APART FROM THE PRESIDENT'S *AVENA* DIRECTIVE

A. The Supremacy Clause Binds Texas To Obey The Nation's Treaty Commitments

Even absent the President's *Avena* Directive, Texas is bound by the Supremacy Clause to observe U.S. treaty commitments under Article 36 of the Vienna Convention, Article I of the Optional Protocol, Article 94 of the U.N. Charter, and Article 59 of the ICJ Statute.

The Vienna Convention is a self-executing treaty—it needs no domestic legislative action to render it enforceable as U.S. law. *See Jogi v. Voges*, 480 F.3d 822, 830–31 (7th Cir. 2007).[9] The Vienna Convention thus represents a treaty

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[9] Before the Senate gave its advice and consent to the Convention, the State Department Legal Adviser testified before the Senate Committee on Foreign Relations that the Convention was entirely self-executing and

"made . . . under the Authority of the United States, [which] shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*" U.S. Const., art. VI, cl. 2 (emphasis added); *see also Sanchez-Llamas*, 126 S. Ct. at 2680 ("[A] self-executing treaty binds the States [to] recognize [its] force in the course of adjudicating the rights of [individual] litigants," and where that treaty "provides for a particular judicial remedy," "[c]ourts must apply th[at] remedy as a requirement of federal law."). Article 36 of the Vienna Convention grants individuals such as Petitioner a right to consular access. This provision does not simply confer on state parties a right that they may exercise for the benefit of their citizens, but rather plainly declares that authorities "shall inform *the person concerned* without delay of *his rights* under this sub-paragraph." Vienna Convention, *supra*, art. 36(1)(b) (emphasis added). The drafting history of that provision,[10] and the Justice Department's regulations on consular notification,[11] similarly confirm that Article 36 confers a right on the individual alien.

"did not require implementing . . . legislation to come into force." S. Exec. Rep. No. 91-9 app. at 5 (1969).

[10] During negotiations, Venezuela proposed eliminating the reference to an individual right, but that proposal met with strong opposition. For its part, the United States proposed language intended to "protect the right of the national concerned." 2 United Nations Conference on Consular Relations: Official Records 37, 38, 84, 85, 331–34, 337, U.N. Doc. A/Conf. 2 5/6, U.N. Sales No. 63.X.2 (1963). The language quoted above was adopted by a vote of sixty-five to two (with twelve abstentions). Justice O'Connor, noting this language, observed that, "if a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed." *Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting from dismissal of writ of certiorari as improvidently granted).

[11] Section 50.5(a) states that an individual alien has the right to ask law-enforcement authorities *not* to contact consular officials—a right that by definition can belong only to the alien and not to the alien's

The U.N. Charter, with the annexed ICJ Statute, constitutes a separate and independent treaty obligation that equally bind Texas. Under Article 94(1) of the Charter, a U.N. Member assumes a solemn obligation to "comply with the decision of the [ICJ] in any case to which it is a party." When the ICJ renders a decision regarding treaty rights, as it did in *Avena*, that decision is considered binding "between the parties *and* in respect of that particular case." ICJ Statute, *supra*, art. 59; *see also Bosnian Genocide Case*, 2007 I.C.J. No. 91, ¶ 123 (confirming that the operative part of an ICJ judgment has the force of *res judicata*). The ICJ has jurisdiction to render a decision when state parties provide their consent to jurisdiction, for example, by a treaty that imparts standing consent such as the Optional Protocol. *See* ICJ Statute, *supra*, art. 36(1); Optional Protocol, *supra*, art. I (accepting the compulsory jurisdiction of the ICJ for "[d]isputes arising out of the interpretation or application of the [Vienna] Convention").

At the time of the *Avena* decision, the United States had duly ratified the U.N. Charter, with the annexed ICJ Statute, the Vienna Convention, and the Optional Protocol, all in accordance with Article II of the Constitution. Accordingly, the United States had undertaken to comply with any forthcoming ICJ decision on the Vienna Convention—an undertaking with which, under the Supremacy Clause, the state courts were obligated to comply "in respect of [Petitioner's] particular case."[12]

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government. *See* 28 C.F.R. § 50.5. The *Foreign Affairs Manual* issued by the State Department also says that "Article 36 of the [Vienna Convention] provides that the host government must notify a foreign national arrestee without delay of the arrestee's *right* to communicate with his or her consular officials." 7 U.S. Dep't of State, *Foreign Affairs Manual* § 421.1-1 (emphasis added).

[12] By its terms, the *Avena* decision obligates state courts to "review and reconsider[] the convictions and sentences of the Mexican nationals referred to" in that decision, "whatever may be the actual outcome of such review" and notwithstanding any "procedural default rule." *Avena*,

Nothing in this Court's recent decisions regarding the Vienna Convention casts doubt on Petitioner's assertion that the ICJ's *final judgment* on the merits of *the particular cases before it* fully binds those state courts that have jurisdiction over the individuals named in *Avena*.[13] The judicial remedy ordered by the ICJ in *Avena*—that U.S. domestic courts must "review and reconsider[]" Medellin's conviction and

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2004 I.C.J. at 56–57, 63–66, 72. "[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of Congress." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.).

[13] In *Breard v. Greene*, a Paraguayan national who had been denied his Vienna Convention rights sought to rely upon a *provisional order* of the ICJ, which "request[ed] that the United States 'take all measures'" to delay his execution. 523 U.S. 371, 374 (1998) (per curiam). Because the petitioner had procedurally defaulted his Vienna Convention claim under state law, the Court denied his petition. The Court intimated, however, that a final award on the merits by the ICJ might have led to a different result. *See id.* at 378 (acknowledging the "unfortunate" fact that "this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier").

In *Sanchez-Llamas*, a habeas petitioner sought to invoke the ICJ's decision in *Avena* to excuse the procedural default of his Vienna Convention claims, even though he was not among the fifty-one individuals mentioned by name in the ICJ proceedings. Because petitioner Sanchez-Llamas was not a party to the *Avena* decision, he could not avail himself of the *Avena decision's* binding effect; he could only put forward a claim based on the ICJ's *interpretation* of the Vienna Convention. 126 S. Ct. at 2677–78. Noting that "[t]he ICJ's principal purpose is to arbitrate *particular disputes* between national governments," this Court held that, while the ICJ's *interpretation* of the Vienna Convention deserved "respectful consideration," it was not binding in Sanchez-Llamas's case. *Id.* at 2683–84. But nothing in *Sanchez-Llamas* suggests that *Avena* does not bind Texas as to the fifty-one Mexican nationals, including Petitioner Medellin, whose "particular dispute[]" the ICJ arbitrated in that case. *See* Brief of United States as *Amicus Curiae* Supporting Petitioner at 20, *Medellin v. Texas*, No. 06-984, 2007 WL 923105 (Mar. 22, 2007) (distinguishing *Sanchez-Llamas* from the present case as "not resolv[ing] the question" presented here).

sentence without regard to procedural-default bars—represents an international obligation of the United States that the Texas courts are not free to disregard.

B. The Treaty Power Exists In Its Present Form Precisely Because The Framers Wished To Keep States From Interfering With The National Government's Conduct Of Foreign Relations

The ruling of the Texas Court of Criminal Appeals in this case violates ratified treaties and so offends the Framers' constitutional vision by promoting precisely the kind of diplomatic failure that prompted the creation of the treaty power in the first place. The Framers established the treaty power, U.S. Const., art. II, § 2, cl. 2, to correct their frustrating experience under the Articles of Confederation.[14] That experience taught that permitting the States to impair the nation's treaty obligations would significantly impede the conduct of the fledgling nation's foreign affairs.

Under the Articles of Confederation, the Continental Congress possessed the treaty power, but virtually all legislative authority rested with the States.[15] This structure left Congress nominally responsible for foreign affairs, but ultimately depended on the good faith of the States to carry

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[14] *See generally* Frederick W. Marks III, *Independence on Trial, Foreign Affairs and the Making of the Constitution* (1973) (explaining that the difficulty of obtaining state compliance with treaties motivated the Constitutional Convention); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1102–49 (2000) (reviewing history).

[15] Article IX of the Articles of Confederation granted Congress sole and exclusive power to make treaties and alliances, but subject to the restriction "that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." Articles of Confederation and Perpetual Union, art. IX.

out treaty obligations. *See generally* Samuel B. Crandall, *Treaties, Their Making and Enforcement* [illegible]–43 (1904). This dysfunctional arrangement caused repeated failures for Congress in its diplomatic endeavors.

The most prominent failure involved the Treaty of Peace with Great Britain of 1783, which had secured both the independence of the United States of America and the new country's claim to expansive boundaries. The Treaty of Peace was quickly attacked on the ground that its principal concessions to the British—financial and amnesty provisions—infringed upon the authority of the States.[16] Almost immediately, a number of state legislatures passed laws that contradicted those provisions. Tensions with Great Britain subsequently worsened, and the treaty's efficacy was seriously jeopardized—so much so that the British refused to carry out their reciprocal obligation to withdraw troops from military posts in the northwestern territory. Crandall, *supra*, at 40–42. The States continued their fractious behavior in connection with diplomatic efforts to establish commercial relations, and other nations became openly skeptical of the trustworthiness of the United States as a treaty partner.[17]

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[16] Article IV of the Treaty provided, *inter alia*, that all debts owed to British creditors that had been extinguished under state law would be resuscitated. Treaty of Peace with Great Britain, Sept. 3, 1783, 12 Bevans 8, 11. Article VI provided that there would be no further confiscations, prosecutions, or other actions taken against Loyalists and that those Loyalists still in prison would be released. *Id.* at 12.

[17] Indeed, foreign skepticism about the Continental Congress's ability to enter binding treaties limited that body's ability to negotiate any commercial treaties aside from a limited treaty with Prussia. *See* Golove, *supra*, at 1131. For example, in response to the American commissioners' request to open commercial treaty negotiations with Great Britain, the Duke of Dorset replied:

> I have been . . . instructed to learn from you, gentlemen, what is the real nature of the powers with which you are invested—whether you are merely commissioned by Congress, or whether you have received separate powers from the respective States . . . . [R]epeated

The ensuing diplomatic paralysis motivated the Framers to redefine the treaty power to repair what Madison called the "constant tendency in the States . . . to violate national Treaties." 1 *The Records of the Federal Convention of 1787*, at 164 (Max Farrand ed., rev. ed. 1937). Alexander Hamilton echoed the same concern in *The Federalist* No. 22: "The faith, the reputation, the peace of the whole Union are . . . continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."

To ensure predictable national compliance with treaties, the Framers drafted three constitutional provisions establishing that treaties would bind the States and supersede conflicting provisions of state law. The Treaty Clause of the U.S. Constitution gave the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. Article I, Section 10 specified that the federal power in this connection was exclusive: "No State shall enter into any Treaty, Alliance, or Confederation." *Id.* art. I, § 10, cl. 1. Finally, the Supremacy Clause declared that the Constitution, the laws of the United States made pursuant thereto, and "all Treaties made, or which shall be made, under the Authority of the

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> experience having taught . . . how little the authority of Congress could avail in any respect . . . .

1 George Ticknor Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States* 289–90 n.1 (1854) (quoting Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785)). Likewise, Lord Sheffield contended:

> No treaty can be made with the American States that can be binding on the whole of them. The act of Confederation does not enable Congress to form more than general treaties: at the moment of the highest authority of Congress, the power in question was with-held by the several States.

Golove, *supra*, at 1128 (quoting John Lord Sheffield, *Observations on the Commerce of the American States* 199-200 (Dublin, Luke White 2d ed. 1784)).

United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*" *Id.* art. VI, cl. 2 (emphasis added).

As the text and structure of these provisions make plain, where our nation's foreign policy is concerned, the Constitution does not recognize dual sovereignty. *See, e.g.*, *The Federalist* No. 42 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). One of the first treaties ratified by the new American government reflected this broad treaty power. A Consular Convention with France, ratified by the first Senate in 1789, was a bilateral precursor to the modern-day Vienna Convention on Consular Relations. *See* Convention Defining and Establishing the Functions and Privileges of their Respective Consuls and Vice Consuls, Nov. 14, 1788, U.S.-France, 8 Stat. 106, 7 Bevans 794. In ratifying the treaty, the Senate made clear that it was acting under its authority to bind the States and to supersede state laws in areas that otherwise fell within the States' legislative province. *See* Golove, *supra*, at 1149–50 & nn. 223, 225.

This Court has since consistently enforced our nation's binding international obligations, notwithstanding contrary state laws. In *Ware v. Hylton*, for example, the Court held that Article IV of the Treaty of Peace—which ensured British creditors that they would "meet with no lawful impediment to the recovery" of debts—nullified a conflicting Virginia statute that permitted such debts to be discharged. 3 U.S. (3 Dall.) 199, 235, 239 (1796). In *Hauenstein v. Lynham*, 100 U.S. 483 (1879), this Court held that a treaty between the United States and the Swiss Confederation superseded inconsistent state law. Similarly, in *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924), the Court ruled that a treaty "will be applied and given authoritative effect by the courts," even in the face of an inconsistent city ordinance. In *Belmont*, this Court memorably wrote that "[i]n respect of all international negotiations and compacts,

and in respect of our foreign relations generally, . . . the state of New York does not exist." 301 U.S. at 331. And in *Pink*, the Court reiterated that "state law must yield when it is inconsistent with, or impairs the policies or provisions of a treaty or of an international compact or agreement. . . . No State can rewrite our foreign policy to conform to its own domestic policies." 315 U.S. at 230–31, 233.

III. TEXAS'S REFUSAL TO COMPLY WITH THE VIENNA CONVENTION, THE *AVENA* DECISION, AND THE PRESIDENT'S *AVENA* DIRECTIVE UNDERMINES U.S. DIPLOMATIC CREDIBILITY AND DAMAGES U.S. FOREIGN POLICY INTERESTS

The vesting of authority to enforce treaties in the federal government effectuates not just a constitutional mandate, but also a critical foreign policy function. Federal treaty enforcement benefits our nation by enabling us more effectively to engage in relations with other nations and to protect the interests of our citizens.[18] As this Court recently recognized in *Crosby*: "Quite simply, if [an inconsistent state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence." 530 U.S. at 377.[19]

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[18] *Cf. Belmont*, 301 U.S. at 331 (relying on Madison's statement during the constitutional debates that "[t]o counteract [a treaty] by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war" (internal quotation marks omitted)).

[19] In *Crosby*, this Court faced a Massachusetts law that threatened to invite World Trade Organization (WTO) enforcement action by the European Union. While "express[ing] no opinion on the merits of [those] proceedings," the Court struck down the offensive state law, at least partly because an adverse WTO complaint against the United States would serve to "embroil the National Government . . . in international dispute proceedings" and "threaten[] relations with the United States." *Id.* at 383 & n.19.

For a compelling example, this Court need look no further than the diplomatic upheaval surrounding the States' well-publicized noncompliance with the Vienna Convention. In the years leading up to the *Avena* decision, the persistent noncompliance of the several States provoked extensive diplomatic protest both from foreign allies[20] and from

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[20] *See, e.g.*, Brian Knowlton, *Execution Pits Mexico Against U.S.; Fox Echoes World on the Death Penalty*, Int'l Herald Trib., Aug. 16, 2002, at 1 (reporting Mexican President Fox's cancellation of a trip to President Bush's Texas ranch as "an unequivocal signal of rejection of the execution" of a Mexican national who had not been informed of his consular rights); Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. Times, Aug. 16, 2002, at A6 (citing call from President Fox of Mexico); Raymond Bonner, *Mexican Killer is Refused Clemency by Oklahoma*, N.Y. Times, July 21, 2001, at A8 (quoting Mexican government as declaring that execution of Mexican national denied Vienna Convention rights was "contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. Times, Mar. 5, 1999, at 14 (quoting German Justice Minister's declaration that the execution of two German nationals whose Vienna Convention rights had been violated by state officials "is barbaric and unworthy of a [nation] based on the rule of law"); George Boehmer, *Killer Loses Fight for Life*, Daily Telegraph (Sydney, Australia), Mar. 4, 1999, at 25 (quoting the German Parliament's Human Rights Committee Chairman Roth's reaction to the LaGrand execution: "When (Secretary of State Madeleine) Albright talks of human rights, for example in China, she must prove her credibility by also taking human rights in the United States seriously."); David Schwartz, *Plan to Execute German Killers Attracts Scrutiny*, Dallas Morning News, Feb. 22, 1999, at A1 (describing efforts by then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog to gain support for clemency from President Clinton and Arizona Governor Hull for Germans on death row); Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set to Die Today for 1975 Killing*, Boston Globe, Dec. 10, 1998, at A2 (describing statements by Canadian government officials responding to execution of Canadian citizen [illegible] Faulder, who had been denied consular rights); Amnesty Int'l, *The Execution of Angel Breard: Apologies Are Not Enough*, *available at* http://web.amnesty.org/library/Index/engAMR510271998 (May 1, 1998) (quoting Paraguayan Deputy Foreign Minister Rachid: "[T]here is not an international summit at which they [the U.S. government] do not preach the preservation of

intergovernmental human rights bodies.[21] In the year between the ICJ's final decision in *Avena* and the President's *Avena* Directive, that diplomatic criticism only intensified.[22]

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human rights. . . . [T]he United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights."); David Stout, *Do as We Say, Not as We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. Times, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper upon execution of Honduran national denied rights under the Vienna Convention: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts."); Laura LaFay, *World Court—U.S. to Halt Execution*, Virginian-Pilot, Apr. 10, 1998, at A1 (describing protests by Mother Teresa, Pope John Paul II, and Italian government against execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. Times, Dec. 23, 1997, at B5 (letter from Ecuadorean Consul General).

[21] *See, e.g.*, *Ramón Martinez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., ¶¶ 69–70 (2002) (describing notification of right to consular assistance as "among the minimum guarantees essential for foreign nationals also to adequately prepare their defense and receive a fair trial" and finding that failure to give notice of such rights violated due process); *Resol. On the Death Sentence Handed Down on Greg Summers in Texas, USA*, B4-0188/99, 1999 O.J. (C 150) 383-84 (passing resolution condemning persistent U.S. failure to notify foreign nationals of rights to consular access and noting "demonstrably extremely poor quality" of defense counsel in case of two German brothers on death row who had not had consular assistance); Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, Wash. Post, Jan. 10, 2003, at A17 (citing concerns expressed by U.N. High Commissioner for Human Rights regarding the execution of Javier Suarez Media, a Mexican citizen, because Texas authorities denied him his rights under the Vienna Convention).

[22] *See, e.g.*, *Oklahoma Gov. Commutes Mexican's Death Sentence*, Reuters, May 14, 2004 (citing testimony of the Mexican Ambassador to the United States before an Oklahoma parole board, and a letter from Mexican President Vicente Fox to the Governor of Oklahoma, urging the commutation of a Mexican national's death sentence due to the failure of state authorities to notify him of his Vienna Convention rights); *Mexico's Fox to Insist US Honor World Court Ruling*, Reuters, April 4, 2004 (quoting Mexican President Vincente Fox as "insist[ing]" the United States comply with the *Avena* decision as an "act of elemental justice").

Perhaps in no other area of our foreign policy have *amici* so consistently heard foreign heads of state, foreign ministers, and foreign ambassadors pleading for the enforcement of U.S. treaty obligations. When an international obligation is plain, as it was when *Avena* was rendered, "statements of foreign powers, . . . indications of concrete disputes with those powers, [and] formal diplomatic protests" are relevant factors in assessing whether state actions will "stand[] in the way of [national] diplomatic objectives." *Crosby*, 530 U.S. at 385–86.

In *amici's* experience, the persistent denial of treaty rights by the States significantly impaired their ability, in various diplomatic roles, to carry out other foreign policy initiatives. For nearly a decade, *amici* recall, important time at bilateral and multilateral meetings was diverted to answering diplomatic demarches challenging practices of the several States under the Vienna Convention. Not only has this issue drawn valuable attention away from core national foreign policy interests, but it has also affected *amici*'s ability to address these interests effectively,[23] and needlessly cost the United States valuable positions of human rights leadership.[24] In a 1998 letter to the Governor of Virginia

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[23] For example, during public demonstrations in front of the U.S. embassy in Honduras to protest the execution of a Honduran who had not been given timely access to the consular officials, more than 4,000 U.S. personnel, including diplomatic staff, had to be protected by armed security. *See U.S. Boosts Security in Honduras as Tempers Flare*, Reuters, Apr. 24, 1998. After the execution of Tristan Montoya, a Mexican who had been denied his rights under the Vienna Convention, Mexicans issued death threats and U.S. tourists were given warnings to stay out of certain areas. Armando Villafranca, *Life and Death Chasm*, Hous. Chron., Sept. 28, 1997, at A1.

[24] Shortly after the execution of two German nationals denied their Vienna Convention rights despite a provisional order of the ICJ, the United States was voted off the U.N. Commission on Human Rights in 2001 for the first time in that body's 54-year history. Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. Times, May 4, 2001, at A1. The United States likewise failed to win a

regarding the pending execution of a Paraguayan national denied consular access under the Convention, one signatory to this brief, former Secretary of State Madeleine Albright, explained that she was "particularly concerned about the possible negative consequences" for the United States' international interests. Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 Am. J. Int'l L. 666, 671–72 (1998). "The execution of Mr. Breard in the present circumstances," she observed, "could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention" and "could be seen as a denial by the United States of the significance of international law." *Id.* Were this Court now to authorize the Texas courts to ignore our obligations under the Vienna Convention and related treaties, our diplomatic partners would inevitably lose confidence in our international commitments and the ambassadors who offer them, particularly insofar as those commitments rely upon domestic courts for enforcement.

To allow state courts to deny individual rights protected by self-executing treaties, by a decision of the ICJ to which the United States agreed to be bound, and by a specific presidential directive implementing that decision would seriously hinder the broad spectrum of America's diplomatic efforts. Left undisturbed, the reasoning of the Texas judges could potentially disrupt a wide array of existing and future treaty regimes. Increasingly, private interests are the subject of international compacts, and domestic litigants can invoke

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seat on the Inter-American Commission on Human Rights for the first time since that body's inception in 1959, and its observer status in the Council of Europe—which bans executions—has been put in jeopardy. Connie de la Vega, *Going It Alone*, Am. Prospect, July 2004, at A22.

treaties as a rule of decision before domestic courts.[25] This Court has acknowledged, for example, that treaties governing international transportation by air, inheritance, and extradition provide substantive legal rules for private disputes that arise within their coverage. *See, e.g.*, *Olympic Airways v. Husain*, 540 U.S. 644, 649 (2004) (acknowledging that Article 17 of the Warsaw Convention concerning air travel provides the basis for an individual cause of action in tort); *Kolovrat v. Oregon*, 366 U.S. 187, 192–94 (1961) (permitting a foreign national to invoke a treaty-based right to inherit U.S. property in the same manner as U.S. citizens); *Rauscher*, 119 U.S. 407 (holding that the provisions of an extradition treaty could serve as a defense to the attempted prosecution of another crime). The compulsory adjudication of disputes before international tribunals has also emerged as a core feature of our foreign relations. Nearly seventy treaties now in force call for mandatory resort to the ICJ,[26] and many others include

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[25] The Vienna Convention and its Optional Protocol are hardly *sui generis* in this regard. This Court has long recognized that both customary international law, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–17 (2004), and treaties, *United States v. Rauscher*, 119 U.S. 407, 418–20, 430–31 (1886), may give rise to individual rights that "partake of the nature of municipal law, . . . which are capable of enforcement as between private parties in the courts of [a signatory] country." *Rauscher*, 119 U.S. at 417–18 (citing the *Head Money Cases*, 112 U.S. 580, 598 (1884)).

[26] Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* The International Court of Justice at a Crossroads 58–81 (Lori F. Damrosch ed., 1987). Treaties establishing jurisdiction in an international tribunal have a long history in U.S. foreign policy. *See, e.g.*, Great Britain-USA, Treaty of Amity, Commerce, and Navigation ("Jay Treaty") (1795), 8 Stat. 116; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 2294, 79 U.N.T.S. 171, 212; Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731, 2743, 216 U.N.T.S. 132, 146; Patent Cooperation Treaty, *opened for signature* June 19, 1970, art. 59, 28 U.S.T. 7645, 7708, 1160 U.N.T.S. 231, 262; International Air Transport Agreement, *opened for signature* Dec. 7, 1944, art. IV, sec. 3,

provisions for binding, international resolution of disputes concerning private commercial interests.[27] In a global

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3 Bevans 922, 925, 84 U.N.T.S. 389, 394; Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, ch. XVIII, ar. 84, 3 Bevans 944, 966, 15 U.N.T.S. 295, 352. Indeed, the United States has not hesitated to institute proceedings before the ICJ under these treaties and on behalf of domestic companies, even when their private claims could arguably have been brought in the courts of another signatory country. *See, e.g.*, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, No. 76, 1989 I.C.J. 15 (July 20, 1989) (suit for breach of the FCN treaty).

[27] *See, e.g.*, North American Free Trade Agreement, ch. 11, Sept. 6, 1992, 32 I.L.M. 605, 639 (1993). American investors have initiated arbitral proceedings under NAFTA against the government of Canada eight times, and against the government of Mexico twelve times, with at least five of those cases resulting in compensation for the American investors. For a list of past and pending NAFTA Chapter Eleven cases, *see* U.S. Dep't of State, NAFTA Investor-State Arbitrations, http://www.state.gov/s/l/c3439.htm (last visited June 27, 2007), and Canada Department of Foreign Affairs and International Trade, NAFTA-Chapter 11-Investment, http://www.dfait-maeci.gc.ca/tna-nac/other/invest-en.asp#nafta (last visited June 27, 2007). *See also* Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU) of the World Trade Organization, *entered into force* Jan. 1, 1995, art. 23(1), *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125, 1241 (1994). In the DSU, WTO members agree to submit to binding arbitration of certain trade disputes, and are under an obligation "to have recourse to and abide by the rules and procedures" of the DSU. The United States has been the complainant in seventy-four of the 324 disputes that have been initiated before WTO tribunals. For a full list of past and pending DSU cases, *see* World Trade Organization, Chronological list of dispute cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited June 27, 2007). The decisions of these tribinals are generally honored by domestic courts and authorities. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 759–62 (2004) (detailing the President's compliance with an adverse NAFTA panel decision regarding U.S. trade laws against Mexican motor carriers); *Canada v. S.D. Myers, Inc.*, 2004 Fed. C.C. LEXIS 20, at *15–16 (Fed. Cl. Jan. 13, 2004) (affording a "high level of deference" to a NAFTA Tribunal in affirming a $7 million award to an American investor against the Canadian government, "so as to be sensitive to the need of a system for predictability in the resolution of disputes"); President's Statement on

climate where general compliance with international judgments is anticipated, "[m]any cases are settled before a final judgment is reached," giving these international judicial bodies "an important 'pacifying effect' on disputes at all stages of litigation."[28]

Amici submit that the ability of the United States both to secure new treaty regimes to help us realize our national interests and to secure reliable enforcement of existing treaty regimes will depend critically on our reputation for honoring those commitments we have already undertaken. Because "international law is founded upon mutuality and reciprocity," *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), the prospect of future agreements will depend critically on whether our state courts are perceived as honoring the President's directives and the three binding treaties at issue here. Given these trends, the need has never been greater for this Court to mandate reliable state judicial enforcement of America's solemn treaty obligations.

CONCLUSION

For all of the foregoing reasons, *amici* urge the Court to reverse the decision below.

Steel, *available at* http://www.whitehouse.gov/news/releases/2003/12/20031204-5.html (Dec. 4, 2003) (withdrawing trade import tariffs on steel after an adverse decision by the WTO Appellate Body) (last visited June 27, 2007).

[28] Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 Am. J. Int'l L. 434, 436 (2004). Even nations with longstanding histories of extreme hostility toward one another have reached agreement on serious diplomatic disputes after referral (or threat of referral) to the ICJ. *See, e.g., Trial of Pakistani Prisoners of War (Pak. v. India)*, No. 60, 1973 I.C.J. 328 (July 13, 1973), and 1973 I.C.J. 347 (Dec. 15, 1973) (dispute settled out of court); *Case Concerning Aerial Incident of July 3, 1988 (Iran v. U.S.)*, No. 79, 1989 I.C.J. 132 (Dec. 13, 1989), and 1996 I.C.J. 9 (Feb. 2, 1962) (dispute settled out of court).

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APPENDIX

APPENDIX - LIST OF *AMICI*

Madeleine K. Albright served as U.S. Secretary of State from 1997-2001 and as Permanent Representative to the United Nations from 1993 to 1997. Dr. Albright is the first Michael and Virginia Mortara Endowed Professor in the Practice of Diplomacy at the Georgetown School of Foreign Service and the first Distinguished Scholar of the William Davidson Institute at the University of Michigan Business School. Dr. Albright is the Chairman of The National Democratic Institute for International Affairs and also serves on the Board of Directors of the New York Stock Exchange.

Stephen W. Bosworth is Dean of the Fletcher School of Law and Diplomacy at Tufts University. During his diplomatic career, he served as U.S. Ambassador to the Republic of Korea, U.S. Ambassador to the Philippines, U.S. Ambassador to Tunisia, Director of the State Department Policy Planning Staff, Principal Deputy Assistant Secretary for Inter-American Affairs, and Deputy Assistant Secretary for Economic Affairs. He has also served as Executive Director of the Korean Peninsula Energy Development Organization (KEDO) and President of the United States-Japan Foundation.

Jeffrey Davidow is the president of the Institute of the Americas at the University of California, San Diego. He served as U.S. Ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush, and as U.S. Ambassador to Zambia (1988-1990), and Venezuela (1993-1996). From 1996 to 1998, he was assistant Secretary of State for Inter-American Affairs. After 34 years in the State Department, he retired with the personal rank of Career Ambassador.

Herbert J. Hansell served as the Legal Adviser of the U.S. Department of State from 1977 to 1979, Member of the

Permanent Court of Arbitration, The Hague, from 1978-1980, and Senior Adviser and Ambassador to the Mideast Peace Negotiations in 1980. He served as Adviser to the United States Trade Representative on international investment in 1980, and as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States. He is also Retired Partner at the law firm of Jones Day.

James R. Jones is a partner with Manatt, Phelps and Phillips LLC, and National Chairman of the World Affairs Council of America. From 1973 to 1987, he was a member of the U.S. House of Representatives from Oklahoma. During his tenure in Congress, he was Chairman of the House Budget Committee and a ranking member of the Ways and Means Committee. From 1989 to 1993, he was Chairman and Chief Executive Officer of the American Stock Exchange. He served as the U.S. Ambassador to Mexico from 1993 to 1997, and was awarded by President Ernesto Zedillo the Aztec Eagle Award, the highest award that can be given to a non-Mexican.

James C. O'Brien, a Principal of the Albright Group LLC, served as Special Presidential Envoy for the Balkans from 2000 to 2001, as Principal Deputy Director of the State Department Policy Planning Staff from 1998 to 2000, and as a State Department official from 1989 to 2001.

Thomas R. Pickering served as the Under Secretary of State for Political Affairs from 1997 to 2001, and was the U.S. Ambassador and Permanent Representative to the United Nations from 1989 to 1992. A Career Ambassador, during his diplomatic career, he also served as Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador to The Russian Federation, U.S.

Ambassador to India, U.S. Ambassador to Israel, U.S. Ambassador to El Salvador, U.S. Ambassador to Nigeria, U.S. Ambassador to The Hashemite Kingdom of Jordan, and Executive Secretary of the Department and Special Assistant to the Secretary. He was also President of the Eurasia Foundation and Senior Vice President for International Relations of The Boeing Company 2001-2005 and is currently Vice Chairman of Hills & Co.

J. Stapleton Roy is Vice Chairman of Kissinger Associates, Inc. A Career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Wendy Sherman is a Principal of The Albright Group and former Counselor of the Department of State and Special Advisor to the President and Secretary of State and North Korea Policy Coordinator.

Nancy Soderberg is a Distinguished Visiting Scholar in the Department of Political Science and Public Administration at the University of North Florida. She previously served as Deputy Assistant to the President for National Security Affairs and as the U.S. Ambassador and Representative for Special Political Affairs at the United Nations.

Abraham D. Sofaer is a Senior Fellow at the Hoover Institution, Stanford University, and Professor of Law (by Courtesy) at the Stanford Law School. He served as a federal district judge in the Southern District of New York from 1979 to 1985. From 1985 to 1990 he served as Legal Adviser at the US Department of State.

Strobe Talbott is President of the Brookings Institution. He served as Deputy Secretary of State from 1994-2001, and Ambassador-at-large and Special Advisor to the Secretary of State for the former Soviet Union from 1993-1994.

Malcolm R. Wilkey is a retired Circuit Judge of the U.S Court of Appeals for the D.C. Circuit, where he served from 1970 to 1985, and is a former U.S. Ambassador to Uruguay (1985-90). He also served as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States from 1979 to 1986.

Frank G. Wisner is Vice Chairman, External Affairs, at American International Group. A career diplomat with the personal rank of Career Ambassador, he served as Ambassador to India from 1994-1997. Additionally, he held the positions of Ambassador to Zambia (1979-82), Egypt (1986-91), and the Philippines (1991—92). Mr. Wisner has served in a number of positions in the U.S. government, including Undersecretary of Defense for Policy (1993-94), Undersecretary of State for International Security Affairs (1992-93), Senior Deputy Assistant Secretary for African Affairs (1982-86), and Deputy Executive Secretary of the Department of State (1977). During the course of his career, Frank Wisner served in the Middle East and South and East Asia. Today Mr. Wisner is a member of the Boards of Directors of American Life Insurance Company (ALICO), EOG Resources and Ethan Allen, as well as the boards of numerous non-profit organizations. He is an advisor to Kissinger McClarity Associates.

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No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSÉ ERNESTO MEDELLÍN

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INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, the Governments of Mexico and the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States promised that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and to its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

On March 31, 2004, the ICJ rendered its judgment in *Avena and Other Mexican Nationals*. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31)[hereinafter "*Avena* Judgment"]. The ICJ held that the United States had violated the rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a

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[1] No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this *amicus*.

remedy for those violations, the ICJ held that the United States must provide Mr. Medellín with meaningful review and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36.

On February 28, 2005, President George W. Bush determined that the United States would discharge its international legal obligations under the *Avena* Judgment by having state courts give effect to the ICJ's decision. Mexico welcomed the President's Determination as confirmation that the United States would comply with its treaty obligations to Mexico and Mr. Medellín. Accordingly, Mexico filed an *amicus* brief in the Texas Court of Criminal Appeals urging the court to implement the *Avena* Judgment and the President's Determination. Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006). On November 15, 2006, the Texas Court of Criminal Appeals held that neither the *Avena* Judgment nor the President's Determination constituted binding federal law, brushing aside the legal obligation of the United States to abide by the remedial decree entered against it in an international adjudicative proceeding that it had agreed by treaty to accept as binding. *Ex parte Medellín*, No. AP-75207, 2006 WL 3302639, at *7, *24 (Tex. Crim. App. Nov. 15, 2006).

As a party to the *Avena* proceedings, Mexico has a direct interest in the implementation of the ICJ's judgment. It has been nearly three years since the ICJ ruled in *Avena*, and the United States's promise to comply with the ICJ's decision remains unfulfilled. Mexico respectfully requests that this Court uphold the promises the United States made to Mexico

and the world community by ordering the review and reconsideration mandated by the International Court of Justice in *Avena*.

SUMMARY OF ARGUMENT

When Mexico and the United States agreed to submit to the jurisdiction of the International Court of Justice, both parties recognized that they would be bound by the Court's final judgment. The two countries are both party to over 50 instruments that provide international dispute resolution mechanisms.[2] Indeed, over the last two centuries, Mexico and the United States have settled hundreds of disputes in this manner.[3] While the facts of the cases, the composition of the

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[2] The subject matter of these treaties encompasses topics as diverse as taxation, *see* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18, 1992, U.S.-Mex., art. 26, 1992 U.S.T. LEXIS 193; copyrights, *see* Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731; narcotics, *see* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, art. 32, 1988 U.S.T. LEXIS 194, *80-81; pollution, *see* International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, art. XIII, 12 U.S.T. 2989; aviation, *see* Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Aug. 15, 1960, art. 13, U.S.-Mex., 12 U.S.T. 60; and chemical weapons, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, art. XIV, 14 U.N.T.S. 45.

[3] For a partial list of arbitrations to which each country has submitted, *see* A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 653, 636-37 (1990).

tribunals, and the rules of procedure have differed, each country has consistently recognized that when it commits itself to resolve a dispute by submitting to the jurisdiction of an international tribunal, it agrees to be bound by the result.

In recent years, Mexico and the United States have disagreed on the scope of the rights established by Article 36. After the two nations failed to resolve their differences through diplomatic channels, Mexico exercised its right to submit the dispute to the International Court of Justice for binding resolution. In doing so, Mexico expressly invoked the rights of its nationals and sought specific remedies on their behalf in its exercise of diplomatic protection. The ICJ weighed the arguments of the parties and the facts of each Mexican national's case, and issued a carefully reasoned judgment adjudicating the rights of Mr. Medellín and 51 other Mexican nationals, thereby settling the dispute that had, at times, strained relations between the two nations.

Under both international and United States law, the *Avena* judgment constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. Cordial and cooperative bilateral relations depend strongly upon good faith compliance by each nation with mutually binding treaty obligations. Each nation expects, and must be able to rely upon, its treaty partners to adhere to their obligations. President George W. Bush recognized this cardinal principle of foreign affairs when he issued the February 28 Presidential Determination.

ARGUMENT

I. Mexico and the United States Agreed by Treaty to Submit Disputes Regarding the Vienna Convention to the International Court of Justice for Binding Resolution.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

On January 9, 2003, after determining that the United States had violated the Vienna Convention in virtually every case in which a Mexican national was facing the death penalty, and after unsuccessfully seeking remedies for those nationals through legal and diplomatic channels, Mexico invoked the Optional Protocol and brought suit in the International Court of Justice. *See* Mexico's Application Instituting Proceedings, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), *available at* http://www.icj-cij.org. The United States fully participated in those proceedings, at the

conclusion of which the ICJ found that the United States had violated the Article 36 rights of 51 Mexican nationals, including Mr. Medellín. *Avena* Judgment, ¶ 153(4)–(7).

The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. By Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." United Nations Charter, art. 94, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031. By Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1055.

Without the United States's express consent, the International Court of Justice could not have heard the *Avena* case or rendered its judgment. Having given its consent, and having fully participated in the proceedings, the United States must now abide by the result.

II. The United States and Mexico Have Consistently Recognized That When a Dispute Is Submitted by Mutual Consent to an International Tribunal, the Resulting Judgment Is Binding.

As neighbors and trading partners, the United States and Mexico have an extraordinarily close relationship. Inevitably,

the two nations have differed on matters ranging from boundary lines and trade practices to the treatment of each country's nationals. When such disagreements have arisen, Mexico and the United States have attempted to resolve them amicably, often through arbitration. Arbitration has staved off armed conflict,[4] resolved boundary disputes,[5] and indemnified private investors[6] as well as individuals who claimed personal injury[7] or denial of due process.[8] Both countries have benefited from international arbitration of their disputes. This may explain why "the history of the relations between the United States and Mexico shows a constant endeavor to resort to this means of settlement." A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 1 (1935).

Conflicts over the treatment of United States citizens in Mexico were a recurring theme in early diplomatic relations between the two countries. DUNN, *supra*, at 1-2. In the mid-

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[4] *See, e.g.*, FREDERICK DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO 10-27 (1933).

[5] *See* U.S. Boundary Relations, 3 Whiteman DIGEST §30, at 680-84 (1964) (describing the agreement of the United States to abide by the terms of arbitral judgment regarding disputed tract of land known as "El Chamizal" in El Paso, Texas).

[6] *See Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF) (Aug. 30, 2000) [hereinafter *Metalclad*].

[7] *See Francisco Quintanilla* (Mexico v. United States), Opinions of the Commissioners 136 (1926).

[8] *See* JOHN BASSETT MOORE, 4 INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3251 (1898).

nineteenth century, United States citizens flocked to Mexico in great numbers. FELLER, *supra,* at 1. Many complained they were subjected to unequal treatment, illegally detained, deprived of due process, or otherwise wronged by Mexican authorities. *See generally* MOORE, *supra,* at 3235-3252. They sought protection from the United States government, which in turn pressed their claims upon the Government of Mexico. *See, e.g.,* DUNN, *supra,* at 18-19. The frequency with which such claims were brought by the United States against Mexico led one commentator to observe that "[t]he subject of the claims of foreign nationals plays a more important role in the history of the foreign relations of Mexico than in that of any other country." FELLER, *supra,* at 1.

Diplomacy proved unable to resolve these disputes, and the unsettled claims of United States citizens in Mexico were cited as justification for war with Mexico in 1846. *See* DUNN, *supra*, at 45-49. After the war, United States citizens continued to allege mistreatment by Mexican authorities. This time, the two nations signed the Claims Convention of 1868, which established a Commission to hear the claims of both Mexican and United States citizens for property damage, personal injury, and wrongful detention.[9] Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, U.S.-Mex., art. II, 15 Stat. 679, 681. After reviewing more than 2,000 claims, the

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[9] *See, e.g.,* MOORE, *supra,* at 3243-44 (describing the wrongful imprisonment claim of A.H. Halstead, which resulted in an arbitral judgment of $1,600.00); *id.* at 3247 (describing the arbitrary detention claim of William P. Barnes, resulting in arbitral judgment of $5,100.00); *id.* at 3251 (describing the wrongful detention claim of Augustus Jonan, resulting in arbitral judgment of $35,000.00 in Mexican gold).

Commission entered judgments against Mexico totaling over $4,000,000.00, a sum far greater than that assessed against the United States. FELLER, *supra,* at 6. Mexico promptly complied with the Commission's judgment. *See Frelinghuysen v. United States ex rel. Key,* 110 U.S. 63, 67 (1884) ("the government of Mexico has promptly and in good faith met its annual payments"); DUNN, *supra*, at 112.

Mexico never disputed its legal obligation to comply with the judgments of the 1868 Claims Commission, even in the face of compelling evidence that some claims were fraudulent.[10] *See La Abra Silver Mining Company v. United States,* 175 U.S. 423, 458 (1899); *Frelinghuysen,* 110 U.S. at 67 (1884). In *Frelinghuysen*, the Court accepted that the judgments of arbitral tribunals "are final and conclusive until set aside by agreement between the two governments." 110 U.S. at 67. The Court further observed that "Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not seek to do." *Id.* at 467-68.

Mexico and the United States have also resorted to international arbitration to resolve economic disputes. In the case of the Pious Fund of California, the Claims Commission awarded the Catholic church of California the sum of

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[10] Article 2 of the Claims Convention provided that "[t]he president of the United States. . . and the president of the Mexican republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decision without any objection, evasion, or delay whatsoever." 15 Stat. 679.

$904,070.79, which Mexico paid in full. REPORT OF JACKSON H. RALSTON, IN THE MATTER OF THE CASE OF THE PIOUS FUND OF THE CALIFORNIAS 5 (1902). But the matter did not end there. The United States contended that Mexico owed additional interest on the fund,[11] and in an attempt to resolve the dispute, both nations agreed to submit to the jurisdiction of the Permanent Court of Arbitration at The Hague.[12] The Pious Fund case was the first judgment issued by the newly-established tribunal. HOWARD N. MEYER, THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS 24 (2002). The Permanent Court of Arbitration issued a unanimous judgment against Mexico on October 14, 1902. Mexico was ordered to pay a lump sum of $1,460,682.67, and to make annual payments of $43,050.99. RALSTON, *supra,* at 15-16. Mexico complied with the judgment, which has now been paid in full. *See* FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 53 (1969).

The commitment of both nations to peaceful dispute resolution through arbitration wavered only once, and the results were disastrous. In 1910, the United States and Mexico agreed to arbitration to resolve a long-running border dispute in El Paso, Texas. Convention for the Arbitration of the Chamizal Case, June 24, 1910, U.S.-Mex., 36 Stat. 2481. The Convention established that the decision of the arbitral

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[11] *Reports of International Arbitral Awards*, v. IX at 5, U.N. Sales No. 59.V.5 (1948).

[12] *See* Protocol for the Adjustment of Certain Contentions Arising Under What is Known as the "Pious Fund of the Californias," May 22, 1902, U.S.-Mex., 9 Bevans 12, 1902 U.S.T. LEXIS 50. Article XIV of the Protocol provided that "the award ultimately given hereunder shall be final and conclusive as to the matters presented for consideration."

commission would be "final and conclusive upon both Governments, and without appeal." 36 Stat. 2483. Nevertheless, when the Commission awarded a large portion of the disputed tract to Mexico, the United States refused to comply with the judgment. ALAN C. LAMBORN & STEPHEN P. MUMME, STATECRAFT, DOMESTIC POLITICS, AND FOREIGN POLICY MAKING: THE EL CHAMIZAL DISPUTE 54-55 (1988). The effects of this decision upon bilateral relations were "significant and lasting," and the United States's refusal to comply became "an integral part of almost every diplomatic issue arising between the two nations" for the following 52 years.[13] SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL DISPUTE 30 (1965). In addition to souring relations between the two countries, *see id.* at 77, the United States's reaction to the judgment led Mexico to reject arbitration as a method of resolving disagreements with United States and British oil companies after President Lázaro Cárdenas nationalized the Mexican oil industry in 1938. *Id.* at 75, 100. In addition, it led Mexico to temporarily suspend its compliance with the Pious Fund judgment entered by the Permanent Court of Arbitration.[14] *See* LAMBORN AND MUMME,

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[13] In 1925, the United States rejected Mexico's suggestion that the dispute be submitted to the Permanent Court of International Justice (the precursor to the International Court of Justice) for arbitration. Since the United States refused to accept the jurisdiction of the international tribunal, the Court had no power to resolve the dispute. *See Convention With Mexico for Solution of the Problem of the Chamizal: Hearings Before the Committee on Foreign Relations, United States Senate*, 88th Cong. 21 (1963) (statement of Ambassador Thomas C. Mann) [hereinafter "Chamizal Hearings"].

[14] *See* WEBER, *supra*, at 42. Mexico suspended payments on the Pious Fund in 1915. In 1966, it resumed payments, *id.* at 51, and fully satisfied its obligations in 1967. *Id.* at 53.

supra, at 171; ANTONIO GÓMEZ ROBLEDO, MEXICO Y EL ARBITRAJE INTERNACIONAL 101 (1965).

In 1963, the United States finally recognized the Chamizal arbitral award. *See* LISS, *supra*, at 89. President Kennedy acknowledged the United States had been wrong in rejecting the Commission's judgment, commenting that "the charge against us for not having abided by the award is grave." *See* President's Message to the Senate Transmitting the Convention for the Solution of the Problem of the Chamizal, 88th Cong. 1-3 (1963); *Transcript of the President's News Conference on Foreign and Domestic Matters*, N.Y. TIMES, July 6, 1962, at A8.

Since then, the United States and Mexico have submitted numerous economic disputes to international tribunals for resolution. And in the early 1990s, both nations signed and ratified the North American Free Trade Agreement, which provides unprecedented opportunities for arbitration of disputes between states and private investors. Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779. In *Metalclad v. Mexico*, an arbitral tribunal awarded a United States-based corporation $16.685 million in damages. *Metalclad*, supra n. 6. Although Mexico had vigorously contested Metalclad's claims, it complied with the judgment. Explaining its decision to pay Metalclad in accordance with the tribunal's decision, Mexico reaffirmed its commitment to honor its international obligations, "even when it does not agree with the findings of the international tribunal nor with the way the tribunal works." *Eye on Investors, Mexico Pays U.S. Company*, N. Y. TIMES, Oct. 29, 2001, at A4.

As the examples above make clear, both the United States and Mexico have long understood that when a dispute is submitted by mutual consent to an international tribunal for resolution – as under the Optional Protocol to the Vienna Convention – the resulting judgment is final and binding.

III. The Protection of Nationals Abroad Has Long Been a Priority of Both Mexico and the United States.

Ever since Mexico and the United States established diplomatic relations, the two countries have been actively involved in the protection of their nationals within the other's territory. In 1942, the two countries signed a bilateral consular convention that codified the customary rights of consular officers to assist their nationals. Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., art. 6, 57 Stat. 800. Among other things, the bilateral consular convention grants consular officers the right to visit detained nationals, to assist them "in proceedings before or relations with authorities of the State," and to "address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." *Id.* The bilateral convention does not contain any provision for arbitration of disputes; instead, article 6 provides that grievances may be addressed through diplomatic channels. *Id.*

The 1963 Vienna Convention on Consular Relations reaffirmed the rights set forth in the Bilateral Convention and elaborated on the types of services consular officers could provide. Vienna Convention, arts. 5, 36. For example, article 5(i) of the Vienna Convention states that "Consular functions

consist in: ... representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." Article 36(1)(c) reinforces this provision, expressly stating that consular officers may "arrange for [the] legal representation" of detained nationals. Significantly, the Optional Protocol to the Vienna Convention gave states parties an additional avenue for dispute resolution that was unavailable under the bilateral consular convention.

Within the framework of these two conventions, both nations have developed comprehensive programs of consular assistance to their nationals abroad.

A. Mexico Has an Active and Longstanding Tradition of Providing Extensive Consular Services to Its Nationals.

Mexican consular officers have provided services to detained Mexican nationals in the United States for nearly two hundred years. And as the population of Mexican nationals in the United States has expanded, Mexico's consular assistance program has become increasingly sophisticated. With 47 consulates, Mexico now has the most extensive consular network of any foreign nation in the United States.[15]

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[15] Japan has the second largest consular network, with 19 consulates. U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, FOREIGN EMBASSIES AND CONSULATES IN THE UNITED STATES (available at http://www.travel.state.gov/law/consular/consular_745.html) (last visited May 31, 2007).

Mexico's commitment to the protection of its nationals stems in part from its conviction, born of experience, that most Mexican nationals are poorly equipped to navigate the legal system of a foreign country. Many Mexican nationals have little formal education and are desperately impoverished. They have trouble grasping abstract legal concepts, and often fail to understand their rights – even after their lawyers have attempted to explain them. Significant cultural and linguistic barriers impede their ability to communicate effectively with their attorneys and to participate fully in their defense. Even nationals who have resided in the United States for many years retain a strong connection with Mexican culture, and some never learn to speak English fluently. Consular assistance can often help overcome these unique disadvantages.

Cultural misunderstandings and linguistic barriers pervade many cases involving Mexican nationals, but these factors take on added significance when the national is facing capital punishment. Given the gravity of the penalty at stake, the Government of Mexico has instructed consular officers to monitor capital cases with particular care. Consular staff receive specialized training so that they can evaluate the quality of the legal representation in each case. The archives of the Foreign Ministry contain files reflecting the involvement of consular officers in death penalty cases in the United States dating back to at least 1920.[16]

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[16] The Oklahoma Court of Criminal Appeals has found that Mexico provided "extensive assistance" to capital defendants in 1993, the year Mr. Medellín was arrested and charged with capital murder. *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005) (describing the quality of Mexico's consular assistance program in capital cases). *See also Marquez-Burrola v. State*, 157 P.3d 749 (Okla. Crim. App. 2007) (describing Mexico's efforts to assist trial counsel in the capital murder trial of a Mexican national); *Two*

Consular officers provide crucial services to Mexican nationals who are facing the death penalty. In accordance with their training, their principal concern is to ensure the defendant receives qualified and effective legal counsel. Over time, Mexico has concluded that the attorneys assigned to represent Mexican nationals often lack the experience and the resources necessary to provide a vigorous defense. In addition, most of the assigned lawyers do not speak Spanish and rarely enjoy access to Spanish-speaking investigators and experts. Even when the national speaks English fluently, his family usually does not. Thus, counsel's inability to speak Spanish presents a substantial impediment to obtaining mitigating evidence from relatives. And invariably, birth records and other critical documents can only be obtained in Mexico.

Consular officers are therefore instructed to support the defense by providing funds for investigators and experts; acting as a "cultural bridge" between the defendant and his lawyer;

Mexicans Die in Electric Chair, N.Y. TIMES, Jan. 28, 1921, at A3 (discussing unsuccessful battle of Mexican consular officers to prevent executions in New York); William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 272 n.2 (1998) (citing a 1934 case in which Mexican consular officials sought access to a national held in a California jail); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 26, 2000, at A20 (describing consular involvement in a Florida capital prosecution, and noting Mexico's reported involvement in 261 death penalty cases since 1994); *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2001) (concluding that Mexico would have intervened in a 1989 capital murder prosecution to assist with a Mexican national's defense and to provide resources to ensure that the defendant received a fair trial and sentencing hearing).

communicating with the defendant's family members, friends and others who may be able to offer assistance or information vital to the defense; tracking down records and other documents; and identifying and transporting family members and other witnesses to the United States. If consular officers conclude that the defense attorney is not able to provide high quality representation, they attempt to secure more effective legal counsel.

Experience has taught the Government of Mexico that consular intervention is most effective prior to trial. Early consular intervention often persuades prosecutors to refrain from seeking the death penalty. Consular officers commonly search all archives and databases in Mexico to determine whether a defendant has a criminal record, and provide documentation of such searches to the prosecution. Consular officers can also obtain birth, school and medical records that provide proof of a defendant's physical or mental condition. This sort of evidence has influenced the outcome of dozens of cases. Statistics maintained by the Mexican Foreign Ministry demonstrate that in at least 142 cases since September 2000 where consular officers were informed of the Mexican national's detention prior to trial, prosecutors waived the death penalty.

In light of the services described above, it is not surprising that the United States government has acknowledged that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) 186 (Nov. 3, 2003).

B. The United States Has Been a Forceful Advocate for the Consular Rights of American Citizens Detained in Mexico.

United States consular officers have been no less assiduous in seeking to protect the rights of detained United States nationals in Mexico. As a close neighbor and treaty partner of the United States, Mexico fully appreciates that the United States has long been one of the most vigorous advocates of strict compliance with the Vienna Convention. As described above, the United States's inability to resolve complaints by its nationals in Mexico was one of the factors that led to war in 1846.

In 1975, complaints by United States citizens incarcerated in Mexico led to congressional hearings. At those hearings, State Department representatives testified at length regarding the rights of United States citizens to seek consular assistance:

> All of us regard consular protection as an inherent right of every citizen. That right is not affected by evidence or findings of guilt. . . . Providing consular protection to American citizens abroad is a basic historic responsibility of this Department and its consular officers.

U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part I, 94th Cong. 16 (1975) (Statement of Leonard F. Walentynowicz). Mr. Walentynowicz observed that in order to fully protect the rights of prisoners and prevent abuses, immediate consular access was critical:

> A particular issue of prime importance is that of denied or delayed consular access. We believe that immediate consular access is the linchpin on which hangs in large measure the solution to many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.

Id., Part II, at 6. Finally, in keeping with the United States's long tradition of protecting the rights of its citizens in Mexico, the State Department emphasized the need to actively intervene in individual cases to ensure that justice is done:

> [W]e are persuaded that to make progress in protecting the rights of U.S. citizens in Mexico, we must repeatedly present Mexican authorities with the facts, demonstrate how they constitute a violation of Mexican and/or international law and norms, and insist that such violations be corrected and prevented in the future.

Id. at 63.

IV. The International Court of Justice Issued a Binding Judgment that Adjudicated the Rights of Individual Mexican Nationals.

In reviewing the claims of Mr. Medellín and the other Mexican nationals, the International Court of Justice was called upon to analyze the treaty's provisions and to apply that analysis to the underlying facts of each case. Mexico

accordingly presented the ICJ with information regarding the violation of the Vienna Convention in each case. Mexico provided, *inter alia,* copies of state and federal court decisions, affidavits, and transcripts relating to violations of Article 36 where available. *See* Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (June 20, 2003), Annexes 35-65. In the case of Mr. Medellín, Mexico supplied the International Court of Justice with the Texas trial court's findings of fact and conclusions of law from state post-conviction proceedings,[17] and provided a separate summary of the Texas court's reasons for rejecting Mr. Medellín's Vienna Convention claim. Memorial of Mexico at A-103, Annex 7, para. 238. For its part, the United States presented its own rendition of the facts of each case, made extensive legal arguments, and submitted over 2,500 pages of diplomatic correspondence, judicial opinions, law review articles, affidavits, and transcripts. Regarding Mr. Medellín, the United States submitted an account of state and federal post-conviction proceedings, including a description of how each court had resolved Mr. Medellín's Vienna Convention claim. Counter-Memorial at A-223, Annex 2, App. 38, para. 7.

The ICJ's final judgment reflects its careful consideration of these materials. The Court analyzed the procedural posture[18] and the facts of each case in determining whether the United States had violated its obligations under Article 36. In particular, where the facts were contested, the

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[17] Memorial of Mexico, Annex 55.

[18] *See, e.g., Avena* Judgment at para. 20 (referring to the different stages of direct appeal and post-conviction review).

Court made detailed findings based on the extensive documentary evidence submitted by the parties. *See, e.g., Avena* Judgment at para. 57 (addressing United States's claim that certain Mexican nationals could have dual citizenship); *id.* at paras. 66-74 (evaluating United States's assertions that certain Mexican nationals had claimed to be U.S. citizens upon arrest); *id.* at para. 89 (reviewing facts of one case in response to United States's contention that the authorities had complied with their Article 36 obligations). The Court also distinguished between those cases in which the United States had violated *all* of its obligations under Article 36 – such as the case of Mr. Medellín – and those in which the United States violated only *some* of its provisions.[19] This is most apparent in the Court's discussion of Article 36(1)(c), which provides that consular officers may "arrange for [the] legal representation" of their nationals.

The Court observed that in 16 cases, Mexican consular officers had learned of their nationals' detention before trial, either through notification by United States authorities or by other means, with sufficient time to arrange for their legal representation. *Avena* Judgment, para. 104. In these cases, the Court concluded that the United States had not violated Article 36(1)(c). It recognized that even though the United States had failed to comply with its obligations to notify the 16 nationals of their consular rights "without delay," consular officers had

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[19] For example, in the case of Ramiro Hernández Llanas, the Court concluded that the United States had violated its obligation to inform the defendant, without delay, of his consular rights. *Avena* Judgment, para. 76. Nevertheless, the Court held that the United States *had* advised the consular post of Mr. Hernández Llanas' detention without delay, in accordance with its obligations under Article 36(1)(b). *Id.* at para. 97.

nonetheless been able to provide some assistance to their nationals prior to trial. In the remaining 34 cases, however, including the case of Mr. Medellín, the Court found that the authorities' noncompliance with Article 36, coupled with Mexico's lack of knowledge of the detentions, had effectively prevented consular officers from arranging for legal representation or providing other resources to improve the quality of the defense. *Id.* at para. 106(4).

With regard to Mr. Medellín, the International Court of Justice held that the United States had violated its obligation under Article 36(1) to inform him of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment at para. 153(4)-(7). To remedy these violations, the ICJ held that the United States had to "review and reconsider" Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States's argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The *Avena* Court set forth specific requirements for effective review and reconsideration. *First,* the *Avena* Court held that procedural default doctrines may not be invoked where it was "the failure of the United States itself to inform" the national of his Article 36 rights that impeded his ability to raise the violation at trial. *Id.* at paras. 112-13. *Second*, the ICJ emphasized that review and reconsideration had to be

"effective" and "guarantee that the violation and the possible prejudice caused by that violation . . . be fully examined and taken into account:"[20]

> [I]n a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" – a concept relevant to the enjoyment of due process rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that *full weight* is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Avena Judgment, para. 139 (emphasis added). *Third,* the *Avena* Court explained that review and reconsideration must be conducted by a court that is empowered "to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* at para. 122.

Unlike the petitioners in *Sanchez Llamas v. Oregon*, 126

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[20] *Avena* Judgment at para. 138; *see also id.* at para. 131.

S. Ct. 2669 (2006), Mr. Medellín's rights were directly adjudicated by the International Court of Justice. There can be no dispute that the *Avena* Judgment is binding between Mexico and the United States as regards Mr. Medellín's case. *See* I.C.J. Statute, Art. 59. This difference is crucial, and as the United States has recognized, it requires that the state courts set aside any procedural barriers that would otherwise bar review of Mr. Medellín's Vienna Convention claim on the merits.

V. The United States Is Obligated to Fully Implement the *Avena* Judgment.

The United States agrees that it has an international legal obligation to comply with the *Avena* Judgment. *See* Petition for Writ of Certiorari at 187a, *Medellín v. Texas,* 127 S. Ct. 2129 (2007). Accordingly, the President determined that the United States would discharge its obligations under *Avena* by having state courts give effect to the decision. *Id.* The Texas Court of Criminal Appeals, however, held that neither the *Avena* Judgment nor the Presidential Determination were binding upon it. Specifically, the Texas Court found that the President of the United States had exceeded his executive authority to ensure that the nation complied with its obligations under *Avena*. *Ex parte Medellín*, 2006 WL 3302639 at *24.

The absence of an executive agreement between the United States and Mexico was "central" to the Texas court's plurality decision that the President had exceeded his constitutional powers. *Ex parte Medellín*, 2006 WL 3302639 at *17. The plurality characterized the Presidential Determination as a "unilateral act executed in an effort to achieve a settlement with Mexico," when no actual settlement had been reached. *Id.*

at *16. It implied that the United States and Mexico should "negotiate" the conditions under which the United States should carry out its obligations under the *Avena* Judgment, observing that the negotiation process "ensures that each sovereignty is represented and heard." *Id.* "What is ultimately achieved through that process, which invariably involves compromise, will reflect a meeting of the minds--a settlement that embodies the terms, conditions, rights, and obligations agreed to during the negotiation process." *Id.*

The Texas court's decision reflects its utter failure to grasp the nature of the international legal proceedings that led to this litigation. Both the United States and Mexico had already agreed *in advance* to be bound by the *Avena* Judgment by acceding to the Optional Protocol, the United Nations Charter, and the ICJ Statute. *See supra* at 5-6. The *Avena* Judgment represents the "settlement" of Mexico's dispute with the United States, and it fully addresses the "rights and obligations" of the United States with respect to the remedy owed to Mr. Medellín. The International Court of Justice agrees:

> [T]he ICJ has always taken the view that it would be incompatible with the spirit and the letter of the [ICJ] Statute and with judicial propriety to deliver a judgment the validity of which would be subject to the subsequent approval of the parties or which would have no practical consequences so far as their legal rights and obligations were concerned. . . . Since, furthermore, a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case in question, it is rare for a decision not to

> be implemented. Generally speaking, those States which accept the jurisdiction of the Court are ready to comply with its decisions.

INTERNATIONAL COURT OF JUSTICE, ICJ HANDBOOK 75 (5th ed. 2004) (citations omitted), *available at* http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf (last visited March 6, 2007). *Cf. La Abra Silver Mining*, 175 U.S. at 463 ("an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned").

Accordingly, there is no need for "negotiation" and "compromise," nor are the parties required to reach a "meeting of the minds" with regard to the *Avena* Judgment. Indeed, it was precisely because negotiations had failed to resolve this dispute that Mexico invoked the Optional Protocol and initiated proceedings before the ICJ.

Likewise, there is no need for a negotiation process that will "ensure that each sovereignty is represented and heard," for both Mexico and the United States were "represented and heard" before the International Court of Justice. A 16-lawyer delegation represented the United States during the one-week hearing in which both nations presented their arguments. The State Department's Legal Adviser, Principal Deputy Legal Adviser, Assistant Legal Adviser for Consular Affairs and Assistant Legal Adviser for United Nations Affairs, an Associate Deputy Attorney General from the Justice Department, and distinguished professors of international law and comparative criminal procedure all argued for the United States. *See Avena* Judgment, preface. Mexico, in turn, was represented by fifteen lawyers, including the legal adviser to the

Mexican Foreign Minister, the Chief of Staff for the Under-Secretary for Global Affairs and Human Rights, the Head of the International Litigation Section of the Mexican Foreign Ministry, the Head of the International Law Section of the Mexican Foreign Ministry, and other distinguished professors and advocates. *Id.*

Although the ICJ took great care to define the parameters of adequate "review and reconsideration," the Court left to the United States the choice of means to implement the Judgment. *Avena* Judgment, ¶154(9). Thus, it is for the United States—not Mexico—to decide which courts are best suited to carry out the process of review and reconsideration. Mexico's interest is in ensuring that each Mexican national subject to the *Avena* Judgment receives full and fair review and reconsideration of his conviction and sentence under the terms set forth in the *Avena* Judgment. Mexico welcomed the Presidential Determination as an indication of the President's intent to bring the United States into compliance with the ICJ's mandate. Had Mexico opposed the President's action, it would not have submitted an amicus brief to the Texas Court of Criminal Appeals in support of Mr. Medellín's argument that the court should abide by the President's determination.

CONCLUSION

Mexico fully expects that its treaty partners are capable of carrying out the obligations undertaken by their duly authorized representatives. In this case, the United States promised Mexico that it would abide by the final judgment of the International Court of Justice regarding the treatment of

Mexican nationals whose rights were violated under Article 36 of the Vienna Convention on Consular Relations. *Amicus curiae* the Government of Mexico respectfully urges this Court to ensure the United States lives up to that promise by reversing the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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No. 06-984

FILED

JUN 28 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF INTERNATIONAL COURT OF JUSTICE EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are either United States citizens who have benefited from consular assistance abroad or suffered in its absence; attorneys or diplomats familiar with the importance of consular assistance; or organizations dedicated to the interests of U.S. citizens abroad.

Ambassador L. Bruce Laingen served in the United States Foreign Service from 1949 to 1987. His tours of service included assignments in Germany, Iran, Pakistan, and Afghanistan. He served as U.S. Ambassador to Malta from 1977-1979. In mid-1979, he returned to Iran for a second term as Chargé d'Affaires of the American Embassy before being held hostage in the Iran Hostage Crisis from November 4, 1979 to January 20, 1981. During the Hostage Crisis, the United States sought and secured a judgment against Iran from the International Court of Justice based on Iran's violation of the Vienna Convention on Consular Relations. Ambassador Laingen holds the Award for Valor from the Department of State, as well as the Distinguished Public Service Medal from the Department of Defense.

Billy Hayes is a filmmaker, producer and writer based in Los Angeles, California. Mr. Hayes spent five years in a Turkish prison during the 1970s, an ordeal described in his book, *Midnight Express*, which was made into a feature motion picture by the same name. Prompt notification of the U.S. Consulate ensured that Mr. Hayes was able to retain a lawyer, while regular consular visits

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[1] Counsel for all parties have consented in writing to the filing of this brief, and those consents have been filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

throughout his incarceration provided an essential and reliable link to the outside world.

Richard Atkins practices law in Philadelphia, Pennsylvania, and has specialized for the past twenty-seven years in assisting American citizens who run afoul of the law in foreign countries. He served as Chairman of the Criminal Law Committee of the International Bar Association and has been a member for twenty-five years of the International Relations Committee of the American Correctional Association. He has testified before the Senate Foreign Relations Committee on international prisoner transfer agreements and wrote a guide to prisoner transfer treaties for the United Nations. Approximately a thousand incarcerated Americans abroad have been freed or returned with his assistance.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs from 1974-1976, and Under Secretary of State for Economic Affairs from 1976-1977. During his lengthy career as a diplomat, he played a key role in Secretary of State Kissinger's negotiations to end white rule in Rhodesia (now Zimbabwe), participated in the final Panama Canal Treaty negotiations, was special emissary for President Carter to El Salvador in 1980, co-chaired the Bilateral Commission on the Future of U.S.-Mexican Relations, and was Senior Counsel to the National Bipartisan Commission on Central America. He has also served as President of the Center for Inter-American Relations in New York, and as President of the American Society of International Law.

Founded in Geneva in 1978, **American Citizens Abroad** (ACA) is a non-profit, non-partisan organization dedicated to serving and defending the interests of U.S. citizens living outside the United States. ACA works closely to assist the U.S. Government in developing cohesive

national policies dealing with Americans overseas. The organization has members in over 90 countries worldwide, including Mexico.

Established in 1973, the **Association of Americans Resident Overseas** (AARO) is a volunteer, non-partisan service organization representing the interests of the millions of Americans living and working abroad. Its mission is to ensure that Americans resident overseas are guaranteed the same rights and privileges as their U.S. counterparts. AARO has worked to change U.S. laws and policies so that Americans abroad receive the same benefits and protection as citizens in the United States.

Founded in 1931, the **Federation of American Women's Clubs Overseas** (FAWCO) is a non-partisan network of 78 independent organizations in 38 countries around the world, with over 15,000 members. FAWCO is a non-profit U.S. corporation and a recognized NGO with special consultative status to the UN Economic and Social Council. Among its stated purposes is to defend the rights of all Americans overseas.

Amici stress that they take no position in this brief on the moral or legal propriety of capital punishment in the abstract, or whether a sentence of death is an appropriate sanction for Mr. Medellín. Some *amici* oppose the death penalty; some do not. All agree, however, that a failure by the domestic courts to give full effect to the rights and protections of the Vienna Convention on Consular Relations — as determined by the international court to which the United States, by treaty, committed their adjudication — would weaken the international framework of reciprocal rights and obligations essential to consular assistance to U.S. citizens, endangering the welfare of Americans abroad.

SUMMARY OF ARGUMENT

The petition before the Court arises from the adjudication by the International Court of Justice (ICJ) of a set of concrete cases involving both individual and national rights under Article 36 of the Vienna Convention on Consular Relations (Convention), and from the refusal of a state court to give effect to the ICJ's Judgment in the case of petitioner.

The United States, as a matter of its national self-interest, attaches great importance to the rights that Article 36 establishes and the corresponding obligations that it imposes — as do *amici*. Every year, a significant number of U.S. citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. The prompt notification of rights and other requirements under Article 36 enable the effective provision of assistance by U.S. consular officers. That assistance affords a vital service to these Americans, maintaining a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system.

The United States played a leading role in drafting Article 36 of the Convention; the Statute that constituted the ICJ; and the United Nations Charter, the treaty that, among other things, established the ICJ as the supreme judicial organ of the U.N. The United States has also, throughout its history, resorted to interstate arbitration as a pacific means of resolving its disputes with other nations. This and other U.S. courts have traditionally enforced the decisions of these tribunals.

Amici respectfully urge that the Court do likewise here. In *Avena and Other Mexican Nationals*, the ICJ acted pursuant to jurisdiction to which both the U.S. and

petitioner's home country, the United Mexican States, assented by treaty.[2] The Court should accord binding effect to the resulting Judgment — as it has to the decisions of other tribunals established by international agreement — as a matter of U.S. obligation and interest. As the United States has informed the Court, "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected."[3]

Indeed, in the view of *amici*, if the United States does not give full effect to the *Avena* Judgment, U.S. citizens will almost surely suffer as a consequence. There seems little that would do more to undermine the rights on which U.S. consular assistance abroad depends than the failure by this country to enforce America's duly adjudicated Article 36 obligations at home.

ARGUMENT

I.

The Reciprocal Rights and Protections of Article 36 Reflect a Foundational Principle of United States Law and Foreign Policy

The framers of this nation's Constitution were acutely aware of the importance that civilized countries

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[2] *See* Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes art.1, Apr. 24, 1963, 596 U.N.T.S. 487.

[3] Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928).

attach to protecting the rights of their citizens abroad when they established the federal judicial power to review all such cases:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.[4]

Indeed, "since the beginning of the country, since the time we first had diplomatic missions overseas, the fundamental purpose of embassies is to serve American citizens when they're in trouble as well as relating to foreign governments. That's a service and a responsibility that the State Department takes very, very seriously."[5]

As early as 1818, the United States exerted diplomatic efforts at the highest levels to secure the release

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[4] THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (J. Cooke ed. 1961). *See also Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) (Federal courts were given Article III jurisdiction over treaty claims so that "all persons who have real claims under a treaty should have their causes decided by the national tribunals"); *cf. Maldonado v. State*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999) ("Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law").

[5] R. Nicholas Burns, Spokesperson, U.S. Department of State, Daily Press Briefing (Sept. 29, 1995), *available at* http://web.archive.org/web/20041227074219re_/www.hri.org/docs/statedep/1995/95-09-29.std.html.

of American citizens unjustly imprisoned overseas. In a notorious incident, Richard Meade, a U.S. citizen, was imprisoned in Spain. He was "finally released only by reason of the active interposition of the government of the United States in his behalf."[6]

Shortly after the United States successfully protected its citizen in Spain, this Court recognized the reciprocal right of the Spanish consul to safeguard the interests of his fellow-citizens in this country:

> To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it.[7]

Fulfillment of this central principle of American law and values has not been confined to the Executive and Judicial Branches. Responding to the arbitrary imprisonment of Mr. Meade in Spain, the U.S. House of Representatives endorsed a resolution in 1818 that "it is the right and duty of the government of the United States to afford to Mr. Meade its aid and protection; and that this

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[6] *Meade v. United States*, 76 U.S. 691, 693 (1869).

[7] *The Bello Corrunes*, 19 U.S. 152, 168 (1821).

House will support and maintain such measures as the President may hereafter adopt, to obtain [his] release . . . ."[8] Following a series of incidents in which U.S. citizens abroad were deprived of their liberty without due process, Congress enacted a statute in 1868 that remains in effect. It authorizes the President to use "such means . . . as he may think necessary and proper to obtain or effectuate the release" of those citizens.[9]

In 1934, when Mexico complained that California officials had not afforded consular access to a detained Mexican citizen, the Department of State stressed the importance of local compliance with the standards upheld by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.[10]

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[8] 32 ANNALS OF CONG. 1699-1700 (1818) *See also* 31 ANNALS OF CONG. (1817) at 832-833 for Secretary of State Adams' correspondence with the Spanish Government concerning the Meade Affair, in response to an earlier House resolution requesting information on the case, *available via* http://memory.loc.gov/ammem/amlaw/lwac.html.

[9] *See* 22 U.S.C. § 1732 (Protection of citizens abroad) (derived from act of July 27, 1868, ch. 249, Sec. 3, 15 Stat. 224).

[10] Secretary Hull to Governor Rolph, telegram of April 10, 1934, Dept. of State file 311.1221 Aragon, Jose/3, reprinted in 4 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 836-37 (1942).

Acting on this core principle, the United States played a central role in the development of the Vienna Convention on Consular Relations. While most Convention provisions codify customary international law, Article 36(1)(b) broke new ground by requiring that foreign detainees be informed without delay of their individual right to consular notification and access.[11]

Significantly, the United States recognized even before ratification that vigorous enforcement of Article 36 would provide important reciprocal benefits to U.S. citizens overseas. The Report of the U.S. Delegation to the United Nations Conference on Consular Relations (Report) notes that Article 36(1)(b) establishes a "requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[12] Indeed, the U.S. government has emphasized in pleadings to the ICJ that the right of consular communication and access secured by Article 36 of the VCCR is "so essential to the exercise of consular functions that its

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[11] For a discussion of the United States' role in drafting the final text of Article 36 and its reasons for doing so, see Brief of Amici Curiae Ambassador L. Bruce Laingen and Capt. John J. Swift, et al., at 6-16, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928).

[12] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 60. Elsewhere, the Report notes that "[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice." *Id.* at 74.

preclusion would render meaningless the entire establishment of consular relations."[13]

II.

The United States Relies on and Enforces the Decisions of International Tribunals as a Means of Resolving Disputes Concerning Rights Such as Those Provided for in Article 36

The United States has often resorted to ICJ adjudication and to the settlement of international disputes through arbitral tribunals. The United States has also sought and provided fully effective local implementation of the resulting decisions.

In 1979, the United States submitted an application instituting proceedings against the Islamic Republic of Iran "concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals."[14] The United States requested that the ICJ "adjudge and declare" that Iran was under a "particular obligation immediately to *secure the release* of all United States nationals currently being detained."[15] Thus, the United States sought more than a declaration that Iran had violated U.S. rights under the Convention. It sought a judgment that Iran was obligated to provide an effective remedy for the violation, fully implemented in fact.

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[13] Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), I.C.J. Pleadings (1980), p. 174.

[14] *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

[15] *Id.* at 6 (emphasis added).

The ICJ entered such a judgment, deciding that:

> [T]he Islamic Republic of Iran must immediately take all steps to redress the situation resulting from [the hostage-taking and following events], and to that end ... must immediately terminate the unlawful detention of the United States Chargé d'Affaires [(*amicus* here)] and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one ....[16]

Thereafter, the United States insisted that Iran must comply with the ICJ's judgment.[17]

Moreover, the Executive Branch has consistently acted to secure prompt domestic compliance with judgments in other cases which the United States recognized as falling within the compulsory jurisdiction of the ICJ. Following an ICJ judgment, the United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ.[18] Extraterritorial treaty rights of the United States in Morocco were later relinquished by a memorandum of President Eisenhower,

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[16] *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *dispositif*, ¶ 3(a).

[17] *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, pg. 9: "The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions."

[18] *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176 (Aug. 27).

dated September 15, 1956, and all cases pending before the consular courts were disposed of by 1960.[19]

In 1979, the United States and Canada agreed to submit a longstanding maritime boundary dispute to the ICJ for adjudication.[20] Although the ICJ's determination of the international boundary in the disputed fishing area "gave to Canadian fishermen waters that New Englanders had fished for more than 200 years,"[21] the Executive Branch nonetheless acted promptly to ensure full domestic compliance with the Judgment.[22]

U.S. courts have long applied the same principles to the resolution of claims arising under treaties. Where a treaty invests an international body with the authority to adjudicate claims arising under its terms, this Court has declared that the decision of that body is "conclusive and final. . . . The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction."[23]

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[19] 22 U.S.C. § 141 note (Ancillary Laws and Directives).

[20] Special Agreement between the Government of Canada and the Government of the United States of America to Submit to a Chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area, U.S.-Can., art. 2(4), Mar. 29, 1979, 33 UST 2797.

[21] *Around the Nation*: *New Fishing Boundaries Are Reported Observed*, N.Y. Times, Oct. 28, 1984.

[22] *Id.* (reporting that a U.S. Coast Guard vessel was on hand to patrol the area of the new boundary line, two weeks after the ICJ decision was announced).

[23] *Comegys v. Vasse*, 26 U.S. 193, 212 (1828); *see also Meade v. United States*, 76 U.S. 691, 725 (1869) (decision of treaty commissioners "dismissing the claim was final and conclusive, and bars a recovery upon the merits" in the domestic courts).

Notably, international arbitral awards resolving treaty-based disputes brought by the United States or Mexico on behalf of their respective citizens have been upheld on the same grounds of finality. The Court has termed such awards "final and conclusive,"[24] and noted that it "might well doubt the soundness of any conclusion that could be regarded as weakening or tending to weaken the force that should be attached to the finality of an award made by an international tribunal of arbitration."[25]

Thus, U.S. practice with respect to ICJ judgments has been consistent with its treatment of the decisions of international arbitral tribunals. This comes as no surprise, as the ICJ's "principal purpose is to arbitrate particular disputes between national governments" as "the principal judicial organ of the United Nations."[26] That practice is also consistent with the express treaty obligations of the United States. In cases that lie within the compulsory jurisdiction of the ICJ, the ICJ's judgment is "binding between the parties . . . with respect to that particular case;" it is "final and without appeal."[27]

There can be no dispute that Mexico's claims in *Avena* concerning its own rights and the rights of Mr. Medellín and other Mexican nationals under Article 36 of the Convention lay within the ICJ's compulsory jurisdiction. As

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[24] *Frelinghuysen v. United States ex rel. Key*, 110 U.S. 63, 67 (1884) (judgments of arbitral tribunals "are final and conclusive until set aside by agreement between the two governments.").

[25] *La Abra Silver. Min. Co. v. United States*, 175 U.S. 423, 463 (1899).

[26] *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684 (2006).

[27] Statute of the International Court of Justice, Arts. 59, 60, 59 Stat. 1062, T.S. No. 993 (1945); *Sanchez-Llamas*, 126 S.Ct. at 2684 (citing ICJ Statute).

a matter of its own long-established practice and its binding treaty obligation, the United States should give the *Avena* Judgment full effect in domestic proceedings.

President Bush has determined that the United States will abide by its international obligations under the *Avena* Judgment "by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the fifty-one Mexican nationals addressed in that decision."[28]

As the United States explained in its brief filed with the Court, compliance "serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law."[29]

By contrast, a failure to give full effect in domestic law to the *Avena* Judgment would have profoundly negative consequences for international relations. The United States is a party to dozens of treaties recognizing the adjudicative authority of the ICJ. The reliability of the United States as a treaty partner, as well as its honor and integrity, is impugned if its commitment to abide by the outcome of the ICJ's adjudication of concrete cases is reduced to a nullity here. Indeed, the entire international framework on which consular assistance depends would be profoundly weakened if the

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[28] Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 app. 2 (2005) (No. 04-5928) (appending President Bush's memorandum for the Attorney General concerning compliance with the decision of the International Court of Justice decision in *Avena*).

[29] Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928) at 11-12.

United States, particularly given its prominence, can freely submit Article 36 disputes to binding ICJ adjudication under a multilateral treaty and then fail to meet its obligation to implement the resulting judgment fully.[30]

III.

Failure to Enforce the *Avena* Judgment Could Have Grave Consequences for U.S. Citizens Abroad

The importance to the United States of compliance with the reciprocal obligations that Article 36 imposes cannot be overstated. As U.S. jurist Stephen M. Schwebel, in his capacity as President of the ICJ, aptly observed, "the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States."[31] Over the last thirty years, the number of Americans living overseas has increased dramatically. The State Department now estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."[32] More than 385,000 U.S. citizens reside in Mexico, the largest

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[30] *Cf. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international [arbitration] agreements.").

[31] *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 426 (Apr. 9).

[32] BUREAU OF RESOURCE MANAGEMENT, U.S. DEPARTMENT OF STATE, FY 2003 PERFORMANCE AND ACCOUNTABILITY REPORT 141 (2003), *available at* http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm.

expatriate American community in any country.[33] The State Department also reports that over 2500 Americans are arrested abroad annually.[34] This total does not include the number of citizens detained outside the formal criminal justice process; all told, roughly 6000 Americans are arrested or detained abroad every year.[35] The largest number in long-term detention — some 400 — are in Mexico.[36] These statistics show that, at one time or another, many U.S. citizens will find themselves overseas in need of legal help, and foreshadow the grave consequences that a failure to apply the *Avena* Judgment could have for American citizens abroad.

One of the "fundamental responsibilities" of U.S. consulates is "helping Americans who are incarcerated; advising them of their legal rights when they're incarcerated, when [they're] imprisoned in foreign countries; helping to

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[33] *See* Bureau of Consular Affairs, *Tips for Travelers to Mexico*, October 2006, *available at* http://travel.state.gov/travel/tips/regional/regional_1174.html.

[34] Office of Overseas Citizens Services, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), *available at* http://travel.state.gov/law/info/info_615.html.

[35] Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, *available at* http://www.healthsystem.virginia.edu/internet/ciag/publications/report_terrorist_threat_abroad_c1999.pdf (report by the Office of Overseas Citizens Services, U.S. Department of State).

[36] Press Statement by James P. Rubin, Spokesperson, U.S. Department of State (Apr. 15, 1998), *available at* www.hri.org/news/usa/ std/1998/98-04-15.std.html.

get them legal assistance."[37] The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

> Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.[38]

On another occasion, Secretary Albright cautioned that non-compliance with the orders of the International Court of Justice "could be seen as a denial by the United States of the significance of international law and the court's processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad."[39]

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[37] R. Nicholas Burns, Spokesperson, U.S. Department of State, Daily Press Briefing (Sept. 29, 1995), *available at* http://web.archive.org/web/20041227074219re_/www.hri.org/docs/statedep/1995/95-09-29.std.html.

[38] S. Babcock, The Role of International Law in United States Death Penalty Cases, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright's letter to Governor Bush, dated November 27, 1998).

[39] Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. Times, April 14, 1998, page 14 (quoting from Secretary Albright's letter to Virginia Governor James Gilmore).

In a decision giving effect to the *Avena* Judgment in the Osbaldo Torres case, the Oklahoma Court of Criminal Appeals put the matter plainly:

> The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government. Even if that assistance cannot, ultimately, affect the outcome of the proceedings, it is a right and privilege of national citizenship and international law. The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has the opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens.[40]

Members of the Texas Court of Criminal Appeals have also recognized the importance of reciprocal compliance and enforcement. Several years ago, four of its members observed:

> If the United States does not provide a mechanism for enforcing the Vienna Convention, why should other signatories enforce the provisions of the treaty? The treaty is an important protection to Texans traveling in other nations. This State should extend the same protections to foreign nationals in Texas that we expect to be

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[40] *Torres v. State*, 120 P.3d 1184, 1187 (Okla.Crim.App. 2005).

> extended to our citizens when they are abroad.[41]

Indeed, much the same concern is evident in opinions filed in *Ex parte Medellín*. Four of the judges noted that they had "no doubt that the President and other executive branch officials play a vital role in protecting the interests of American citizens abroad when necessary."[42] Another judge wrote separately to emphasize full domestic compliance with Article 36 "as an obligation that must be fulfilled in the same manner we all hope is reciprocated by other nations whose detained nationals might be United States citizens."[43]

Two recent cases of U.S. citizens arrested abroad illustrate the vital necessity of maintaining universal compliance with consular notification and access obligations. Pulitzer Prize-winning reporter Paul Salopek was arrested in the Sudan when on assignment for *National Geographic* magazine to the Darfur region. Mr. Salopek was charged with spying, using official information, publishing false news and entering Sudan without a visa. He endured death threats, beatings and lengthy interrogations during his confinement. According to a State Department news article on the case,

> U.S. consular officials have met with Salopek in prison and are providing assistance. In addition, the U.S. Embassy in Khartoum has been in regular contact with Salopek's family

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[41] *Rocha v. State*, 16 S.W.3d 1, 26 (Tex. Crim. App. 2000) (Holland, J., concurring).

[42] *Ex parte Medellín*, ___ S.W.3d ___, 2006 WL 3302639 (Tex. Crim. App. 2006), slip opinions at 19.

[43] *Id.* at 28 (Price, J., concurring).

> and his editors. The State Department has emphasized to the government of Sudan that it expects Salopek to receive a fair and speedy trial.
>
> In general, when Americans are arrested overseas, U.S. consular officials work to protect U.S. citizens' legitimate interests and ensure they are not discriminated against. Embassy personnel provide a list of local attorneys, visit American prisoners, inform those prisoners about local laws and contact family and friends. Consular officers can transfer money, food and clothing to the prison authorities from family or friends, and can try to get relief if Americans are being held under inhumane or unhealthful conditions.
>
> State Department officials expressed concern that Sudanese authorities failed to notify the U.S. Embassy, as mandated by the Vienna Convention on Consular Relations, for nine days after Salopek was detained.[44]

The same article noted that "a Sudanese court convicted American college student Ethan Rafal of entering Sudan without a visa and ordered him deported" and that Mr. Rafal returned to the United States two days later "after close cooperation between U.S. Embassy and Sudanese officials." In Mr. Salopek's case, less than a month after U.S. consular

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[44] Michelle Austein, Press Freedom Group Calls Journalist's Jailing "Disgraceful," U.S. Department of State International Information Programs, Aug. 28, 2006, *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=006&m=August&x=20060828161927hmnietsua0.6934931.

officials intervened and following high-level diplomatic efforts, all charges against him were dropped and he was released from custody.[45]

Similarly, Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for espionage.[46] She and her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.[47] These arbitrary detentions of Americans abroad prompted the House of Representatives to pass a resolution unanimously condemning the acts of the foreign government and endorsing executive intervention, just as the House had done nearly two centuries before in the Meade case.[48]

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[45] *See Sudanese Government Drops Spy Charges, Releases American Journalist*, PBS Online Newshour, Oct. 9, 2006, *available at* http://www.pbs.org/newshour/bb/africa /july-dec06/salopek_10-09.html; *see also* Richard A. Lovett and Ted Chamberlain, *Freed by Sudan, "Geographic" Reporter Arrives Home in U.S.*, National Geographic News, Sept. 10, 2006, *available at* http://news.national geographic.com /news/2006/09 /060910-salopek.html.

[46] *See US Family Detained in China*, BBC News, Mar. 21, 2001, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/1233163.stm; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, *available at* http://www.csmonitorservices.com/csmonitor/archivesearch.jhtml.

[47] *See id.*

[48] *See* H.R. Res. 160, 107th Cong. (2001) (House "condemns and deplores the lack of due process afforded" to Chinese-American scholars detained in China and the President should make their immediate release "a top priority of U.S. foreign policy"); *cf.* 32 ANNALS OF CONG. 1699 (1818) (imprisonment of Meade "is an act of cruel and unjustified

As U.S. officials have repeatedly stressed, the authority of the United States, both moral and legal, to demand that other nations comply with their obligations in such cases depends on U.S. compliance with the same obligations at home. At no time could those obligations be clearer than they are now. The ICJ adjudicated a set of cases, including petitioner's. The resulting *Avena* Judgment found violations of Article 36 rights and held that the necessary remedy, in this and other cases that resulted in convictions and severe sentences, is a judicial process that will "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account."[49]

This adjudication, to which the United States bound itself by treaty, defines the United States' obligations as a matter of its own law and long-standing practice,[50] and as a

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oppression" and the House "will support and maintain such measures as the President may hereafter adopt" to obtain his release).

[49] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶ 138.

[50] THE FEDERALIST NO. 64, at 392 (John Jay) (Clinton Rossiter ed., 2003):

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

matter of its national interest. The many Americans who live, work, and invest abroad — and most of all those arrested in foreign jurisdictions — depend for their safety and security on the faithful observance of reciprocal obligations. *Amici* urge the Court to give the same full effect to the treaty commitments at issue now that it has long provided in the past[51] and that the United States has, during its entire history, justly insisted on for its own citizens abroad.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below.

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[51] *See, e.g., Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) ("We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect.").

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30 pgs

No. 06-984

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* AMBASSADOR L. BRUCE LAINGEN *ET AL.* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law, international dispute settlement, and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the obligations arising from a final judgment of the ICJ interpreting a treaty of the United States in proceedings in which the United States participated fully, and the respect that should be accorded to the judgment by all courts in the United States, in the context of a petition to allow review and reconsideration of a conviction and death sentence.

Amici limit their submission to questions concerning the ICJ judgment interpreting the consular treaty and the rights that individuals may assert under that judgment and treaty in U.S. courts. They do not take a position on the death penalty; indeed, *Amici* occupy diverse points on the spectrum of opinion about the death penalty, as well as on other political controversies. *Amici* are united in the view that an ICJ judgment interpreting and applying a treaty, rendered pursuant to consensual jurisdiction in a case to which the United States was party and addressing the claims of certain named foreign nationals, is binding on all courts in the United States to which claims under the treaty may be presented in respect of each named individual; that state courts are required to apply the treaty in the manner specified in the judgment; that state procedural default rules cannot foreclose the exercise of treaty rights to a hearing as held by the ICJ in its judgment concerning those individuals; and that petitioner accordingly has the right under the judgment

1. No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

to review and reconsideration of his conviction and sentence. This Court is the proper organ within our federal system to ensure that the state courts comply with the ICJ judgment.

SUMMARY OF ARGUMENT

Petitioner José Ernesto Medellín is one of 49 Mexican nationals now on death row in states of the United States who are named in the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 ICJ 12. Those individuals are similarly situated in that they were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, to contact the Mexican consular post, were convicted and sentenced to death without benefit of timely consular services, and have been held by the ICJ to be entitled to review and reconsideration of their convictions and sentences as a remedy for that treaty violation – a violation that the United States has acknowledged.

The court below erred in denying the relief that the ICJ has found to be required to redress the treaty violations in *Avena*. *Avena* resulted from a treaty-based judicial process to which the United States fully consented, in which the United States fully participated, and which binds the United States as a whole. The United States consented to the jurisdiction of the ICJ to decide this dispute and is obliged under Article 94 of the U.N. Charter, Article 59 of the ICJ Statute, and the Vienna Convention and its Optional Protocol – four treaties that were in force for the United States at the time of *Avena* – to carry out the judgment. Pursuant to the Supremacy Clause of the Constitution, all courts in the United States are obliged to exercise their judicial powers within their respective jurisdictions consistently with the *Avena* judgment.

This Court has not yet ruled on the effects in state and federal law of a final ICJ judgment addressing treaty-based rights of specific individuals. The judgment was rendered after a thorough adversarial process, in which Mexico represented Medellín's legal interests through the internationally recognized mechanism of diplomatic protection and in which the United States

conclusively represented the legal interests of the state of Texas, in full accordance with international law and U.S. constitutional law. No further action is required in international or U.S. law for the judgment to be fully operative as a rule of decision for state courts, and this Court should therefore instruct the Texas courts to implement it.

ARGUMENT

I. The *Avena* Judgment Binds State Courts In Respect Of Individuals Covered By The Judgment.

The Texas Court of Criminal Appeals erred in taking this Court's decision in *Sanchez-Llamas v. Oregon*, 548 U.S. ___, 126 S.Ct. 2669 (2006), to stand for the proposition that "*Avena* is not binding federal law" in respect of an individual covered by *Avena* itself. App. to Pet. for Cert., p. 20a; *see also* p. 24a, pp. 63a-64a. The decision declining to apply the reasoning in *Avena* for the benefit of petitioners Sanchez-Llamas and Bustillo (whose cases were never presented to the ICJ) could not have determined or affected the binding force of the *Avena* judgment in this case, either under international law or under the Supremacy Clause of the U.S. Constitution. Thus a finding in favor of petitioner Medellín in the present case would in no way be inconsistent with *Sanchez-Llamas*.

A. The *Avena* Judgment Is Binding in International Law.

Under Article 94(1) of the Charter of the United Nations, 59 Stat. 1031, T.S. 993 (1945), "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Under Article 59 of the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], which is an integral part of the U.N. Charter,[2] decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added). As the ICJ has recently explained, "Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that

2. *See* U.N. Charter, art. 93 (all U.N. members are *ipso facto* parties to the ICJ Statute).

the parties are bound by the decision of the Court in respect of the particular case."[3] Thus, as between the United States and Mexico in respect of *Avena* (which includes the Medellín matter), the decision of the ICJ incontrovertibly is binding.

By ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the U.S. Senate under Article II of the Constitution in 1945, the United States accepted the obligation to comply with ICJ judgments in any cases that would come within the ICJ's consensual jurisdiction in the future. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

The jurisdiction of the ICJ in the *Avena* case was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for ... in treaties and conventions in force." The Optional Protocol was a treaty in force under Article 36(1) of the ICJ Statute at the time of *Avena*.[4] Proceedings under Article 36(1) produce binding judgments under Article 59 of the Statute, which are "final and without appeal" under Article 60. As the ICJ has recalled:

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3. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn.-Herz. v. Serbia), 2007 ICJ No. 91, para. 115.

4. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487. Article I of the Optional Protocol states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

On March 7, 2005, the United States gave notice of withdrawal from the Optional Protocol. Under principles common to U.S. and international law, that notice cannot have retroactive effect on the obligation to comply with a judgment rendered when the Optional Protocol was fully in force for both parties to the judgment.

> it is in the interest of a party that an issue which has already been adjudicated in favour of that party not be argued again. . . . Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.[5]

A litigant's obligation to carry out judgments against it – made explicit by the terms of the U.N. Charter and ICJ Statute – is implicit in the rule of law.

Amici respectfully emphasize the fully consensual nature of the obligations undertaken when the United States agreed by treaty to the Vienna Convention and to the Optional Protocol's system for binding settlement of disputes arising thereunder. The Optional Protocol serves as a forum selection clause, with the effect that parties that have selected the ICJ as the forum to decide their disputes are bound to carry out its decisions.[6] The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses, but once having given consent to a treaty and to a treaty-based dispute settlement system, the United States is bound to comply with the obligations to which it has agreed. Indeed, this Court has long recognized that "an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith" (absent fraud or comparable basis for impeachment). *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899).

The Texas court misunderstood the nature of an international judgment in treating *Avena* as not binding. A state court is not free to depart from the terms of a judgment in which an international tribunal exercising a consent-based jurisdiction accepted by the federal political branches has definitively settled a treaty dispute, nor to place conditions on compliance that are

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5. *Bosnian Genocide*, note 3 *supra*, 2007 ICJ No. 91, para. 116.

6. *Cf. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985).

inconsistent with the judgment itself. It was thus error for that court to continue to apply state rules of procedural default in a manner incompatible with *Avena*'s disposition concerning an individual named in the judgment,[7] as well as to deny the efficacy of the acknowledgment by the President of the United States of the obligatory force of the judgment. By contrast, in Oklahoma, where the case of another individual covered by *Avena* was pending, the state's executive and judicial authorities correctly treated the judgment as binding and granted review and reconsideration.[8]

The President accepts that the United States has incurred "international obligations" under *Avena*; *see* President George W. Bush, Memorandum on Compliance with the Decision of

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7. The ICJ concluded that while the procedural default rule in itself does not violate Article 36 of the Vienna Convention, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his own or his country's treaty rights. In *Avena*, the treatment of procedural default and related questions comes under the general heading of "Article 36, paragraph 2," beginning at paragraph 107 of the judgment. *See especially* paras. 111-113, 133-134, 138.

8. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. 2004) (unpublished; *reprinted at* 43 INT'L LEGAL MAT. 1227 (2004)) (granting remand for evidentiary hearing), *after remand*, 120 P.3d 1184 (Okla. Crim. App. 2005) (final judicial determination of whether governor's commutation of death sentence overcame any prejudice to defendant from treaty violation); *see* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Implementation of* Avena *Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581, 582-84 (2004) (Oklahoma governor's office stated that "the ruling of the ICJ is binding on U.S. courts;" Chapel, J., concurring in remand from Court of Criminal Appeals to trial court, wrote: "As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision."). *See also* John R. Crook, *Contemporary Practice of the United States: Oklahoma Court Finds Accused Was Prejudiced by Lack of Consular Notification in Death Penalty Case*, 99 AM. J. INT'L L. 695 (2005); *Oklahoma Court Addresses Proof of Prejudice for Failure to Provide Consular Access*, 100 AM. J. INT'L L. 402 (2006).

the International Court of Justice in *Avena*, Feb. 28, 2005. In its filings in the present matter and in other cases, the United States Government has consistently acknowledged that "the United States has an international obligation under Article 94 [of the U.N. Charter] to comply with the *Avena* decision,"[9] and that the operative provisions of the judgment specify that obligation.[10]

This Court in *Sanchez-Llamas* made a clear distinction between an ICJ judgment and ICJ treaty interpretations outside the framework of such a judgment, both by drawing attention to the terms of Article 59 of the ICJ Statute (quoting the language on binding force "between the parties and in respect of that particular case," 126 S.Ct. at 2684) and by observing that the ICJ's principal purpose is "to arbitrate particular disputes."

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9. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 38-39, *Medellín v. Dretke*, 544 U.S. 660 (2005); Brief for the United States as Amicus Curiae at 18 n. 2, *Ex Parte Medellín* (Tex. Crim. App. Sept. 2, 2005); Brief for the United States as Amicus Curiae Supporting Petitioner (at petition phase) at 11, *Medellín v. Dretke*, S.Ct. No. 06-984.

In *Sanchez-Llamas*, the United States Government likewise confirmed that the United States "is obligated under international law to comply with the judgment of the ICJ in any case to which it is a party." Brief for the United States as Amicus Curiae Supporting Respondents at 29, *Bustillo v. Johnson* and *Sanchez-Llamas v. Oregon*, 548 U.S. ___, 126 S.Ct. 2669 (2006).

10. Following the distinction in international practice between a judgment's operative provisions (*dispositif*) and its reasoning, the U.S. Government's briefs construe "decision" under Article 59 of the ICJ Statute as referring to "the portion of the ICJ ruling with which the United States has an international obligation to comply – what in United States practice would be called the judgment." *See* Brief for the United States as Amicus Curiae Supporting Respondent at 38-39 n. 12, *Medellín v. Dretke*, 544 U.S. 660 (2005); Brief for the United States as Amicus Curiae Supporting Petitioner (at petition phase) at 11 n. 1, *Medellín v. Dretke*, S.Ct. No. 06-984.

In its recent judgment in the *Bosnian Genocide* case, 2007 ICJ No. 91, para. 123, the ICJ confirmed that the operative part of a judgment possesses the force of *res judicata*.

In declining to give conclusive effect to such interpretations at the behest of persons not covered by the judgment, this Court took note that "the United States has agreed to 'discharge its international obligations' in having state courts give effect to the decision in *Avena*." 126 S.Ct. at 2685.

Under the U.N. Charter, the ICJ Statute, and the general international law of dispute settlement, the obligation to comply with the judgment devolves upon the respondent state as a whole and falls to be carried out by the organs of the respondent state having domestic constitutional responsibility for the matters therein. No further step is required on the international level to perfect this obligation. In particular, the Security Council is neither required nor expected to exercise its enforcement powers, unless the respondent state defaults on its obligation to comply. *See* Section II.B *infra*. There is likewise no basis in international law for the suggestion in Part III.B of the opinion below (App. to Pet. for Cert., pp. 43a-47a) that a post-judgment agreement between the United States and Mexico would be needed as a predicate for carrying out the already existing treaty-based obligation to comply with the judgment.

B. The *Avena* Judgment Is Binding Under the Supremacy Clause.

The *Avena* judgment in petitioner's case implements a treaty obligation of the United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all courts in the United States and supplies the rule of decision in a state habeas petition.

The Senate gave unanimous advice and consent to the Vienna Convention and to dispute settlement under the Optional Protocol,[11] and the United States participated fully in the litigation that led to the judgment without questioning the ICJ's jurisdiction. The Vienna Convention binds all treaty partners, regardless of whether they are federal or unitary states; courts

11. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (before § 464); § 465.

in the United States are required to apply it in matters falling within their jurisdiction.[12] The Supremacy Clause gives assurance that the United States will carry out its obligations under Article 36(2) of the Convention, which provides that the laws and regulations of the receiving state "must enable full effect to be given to the purposes" of the rights accorded under Article 36. There has never been the slightest doubt that the Vienna Convention prevails over any inconsistent state law.[13] A final judgment applying the treaty and specifying the remedy for its violation likewise enjoys the status of supreme federal law.

This Court in *Sanchez-Llamas* confirmed the well-established position that "a self-executing treaty binds the States pursuant to the Supremacy Clause" and that:

> where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other

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12. The Department of State witness informed the Senate: "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, *reprinted in* Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. *See also* RESTATEMENT, Intro. Note before § 464.

13. The priority of treaty law over state law as required by the Supremacy Clause was spelled out explicitly in the State Department's responses to the Senate's questions:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].
>
> To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

> federal branches. Courts must apply the remedy as a requirement of federal law.

126 S.Ct. at 2680. While the Court there held that the remedy of suppression of evidence was not required by the Vienna Convention, the approach of *Sanchez-Llamas* is entirely compatible with giving the *Avena* judgment full effect in the courts of the states where the individuals covered by *Avena* are in custody. Because *Avena* specified that the Vienna Convention itself requires municipal courts to supply the remedy for breaches (paras. 121-122, 128-134), all aspects of the present petition are properly understood as implementation of treaty obligations which fall to state courts in the United States to execute.

C. The *Avena* Judgment Binds Both Medellín and the State of Texas.

Respondent has contended that the *Avena* judgment does not qualify as binding federal law because neither Medellín nor the State of Texas was party to the litigation at the ICJ. Brief in Opposition to the Petition for Certiorari (p. 16). This argument misunderstands the nature of international claims settlement through interstate adjudication. Mexico exercised diplomatic protection on Medellín's behalf by bringing his claim of treaty violation to an international tribunal – a practice which has long been recognized in international law and in the jurisprudence of this Court – with the ICJ being the proper channel for resolution of Vienna Convention disputes. Because only states (in the international sense) can be parties to a case at the ICJ under Article 34 of the ICJ Statute, the U.S. government represented all the interests of the United States in responding to Mexico's suit, including the legal interests of Texas and all other states of the Union. The outcome is thus fully conclusive of the legal relationship between Medellín and the state of Texas.

1. Mexico's Submission of Medellín's Treaty Claim to the ICJ Is Conclusive of Medellín's Vienna Convention Rights in the United States.

Mexico brought its case at the ICJ in its own right "and in the exercise of its right of diplomatic protection of its nationals." *See Avena*, 2004 ICJ at 23, 35, 58, paras. 14(1), 14(4), 40, 116.

Medellín's claim was identified as case number 38 in *Avena* and was addressed by name and number at several points in the judgment, including in the operative provisions. *See Avena* at 25, 53-54, 70-72, paras. 16, 106, 153. In the context of addressing and rejecting the U.S. contention that the claims should be considered inadmissible in respect of any individual who had not yet exhausted municipal remedies, the ICJ observed that the treaty rights of Mexico and of its nationals are interdependent. *Avena* at 34-36, paras. 38, 40. Because of this interdependence, the ICJ found it unnecessary to address the claims under a distinct heading of diplomatic protection. *Ibid.* It follows that the ICJ's adjudication of the necessarily interdependent rights of the state and its nationals is fully conclusive of both sets of rights.

Under international law and practice, it is well-established that states may exercise diplomatic protection on behalf of their nationals by invoking the consent-based jurisdiction of international tribunals, whose judgments then produce a definitive settlement of the claims so presented.[14] U.S. diplomatic practice and the decisions of this Court are fully consistent with the view that an individual's claim can be

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14. On diplomatic protection in general, see International Law Commission [ILC], Draft Articles on Diplomatic Protection adopted by the ILC at its 58th Session (2006) and official commentaries, *in* ILC, *Report on the Work of its 58th Session*, U.N. Doc. A/61/10 (2006), and the first and seventh reports of the ILC's special rapporteur on diplomatic protection, John R. Dugard, *in* U.N. Doc. A/CN.4/506 (Mar. 7, 2000) and U.N. Doc. A/CN.4/567 (Mar. 7, 2006).

The term "espousal" is often used when a state, in the exercise of diplomatic protection, takes up the claim of one of its nationals and makes the claim its own. Because Mexico in *Avena* was asserting its own rights as well as those of its nationals, the ICJ properly concluded that the exhaustion of local remedies rule (required in ordinary espousal cases), was not applicable to the interdependent claims. *See Avena* at 35-36, para. 40. For purposes other than exhaustion, however, and in particular for the application of this Court's jurisprudence concerning espousal (*see infra*), it is correct to consider that Mexico espoused the claims of its nationals.

conclusively resolved through this form of intergovernmental dispute settlement procedure. Ever since the arbitral commissions constituted under the Jay Treaty in the earliest days of the American Republic, it has been understood that claims of foreign nationals against the United States (including states of the United States), and claims of U.S. nationals against foreign states, can be taken up by their respective governments and presented to international tribunals, and that the outcome of the interstate dispute settlement procedure binds both the states and their nationals and can have conclusive effects within the U.S. legal system. *See generally* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 838, 842-43, 851-62, 865-66, 877-82 (2007) (surveying two centuries of U.S. diplomatic practice and analyzing relationship between international tribunals and U.S. legal system, in support of conclusion that supranational adjudication with binding and preclusive effects in U.S. law is historically well-grounded and presents no constitutional difficulties); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 713 cmt *a* (state whose national has been injured may invoke remedies under international agreement, including resort to ICJ).

The ICJ (carrying on the jurisprudence of its predecessor, the Permanent Court of International Justice) has been a significant forum for the presentation of claims of injury to a state's nationals.[15] Several of the cases initiated by the United States at the ICJ have involved claims brought in the exercise of diplomatic protection of U.S. nationals, with or without a parallel claim of injury to the United States in its own right. The first ICJ case brought by the United States, *Rights of Nationals of the United States of America in Morocco*

15. *See, e.g., Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A), No. 2; *Barcelona Traction Light & Power Co. Ltd.* (Belg. v. Sp.), 1970 ICJ 4. The most recent ICJ decision, *Diallo* (Guinea v. D.R. Congo), 2007 ICJ No. 103 (May 24, 2007), addresses issues of diplomatic protection (paras. 39, 45) with reference to the ILC Draft Articles, note 14 *supra*.

(Fr. v. U.S.), 1952 ICJ 176, involved protection of U.S. nationals in what was then a French protectorate; the judgment was taken as definitively resolving the dispute over the rights of the nationals in question.[16] In *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, the United States invoked four treaties to bring claims to the ICJ on behalf of U.S. nationals who were being held hostage in Iran and received a final judgment upholding the claims. In *Elettronic Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 ICJ 15, the United States presented a claim to the ICJ on behalf of Raytheon Corporation (a U.S. national) and its Italian subsidiary. The ICJ judgment on the merits definitively resolved the corporations' claims.[17]

The jurisprudence of this Court has long recognized that when a government exercises diplomatic protection by submitting claims of its nationals to an international tribunal, the government makes the claim its own, with conclusive effects on the individual's rights. *See, e.g., Frelinghuysen v. Key*, 110 U.S. 63, 71-73 (1884); *United States ex rel. Boynton v. Blaine*, 139 U.S. 306, 323 (1891); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459-63 (1899). These decisions confirm that the presentation of a national's claim to an international tribunal entails a definitive settlement of the dispute, and that

16. *See Treaty Rights of the United States in Morocco: International Court of Justice Ruling of August 27, 1952*, DEP'T STATE BULL., Oct. 20, 1952, at 620-623 (on dismissal of cases pending in U.S. consular courts as a result of the ICJ decision); AIDA AZAR, L'EXÉCUTION DES DÉCISIONS DE LA COUR INTERNATIONALE DE JUSTICE 42-43, 93 n. 253 (2003) (citing French court decisions applying the treaty according to the ICJ's judgment).

17. For an example of a diplomatic protection case with the United States as respondent, see *Interhandel* (Switz. v. U.S.), 1959 ICJ 6, 27 and the related case at this Court *sub nom. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). The ICJ dismissed the *Interhandel* claim in light of the pendency of the U.S. proceeding; since the international case did not continue to final judgment, the question of the effects in domestic law of such a judgment did not arise.

an individual's legal interests can be conclusively determined through that international procedure, even over his or her objection.

Presentation of claims to an international tribunal can decisively alter the rules of law applicable in domestic courts, even in cases that were already pending in the U.S. legal system. In *Dames & Moore v. Regan*, 453 U.S. 654, 679, 685 (1981), this Court held that U.S. companies would have to abide by an international dispute settlement procedure resulting from the U.S. government's espousal of their claims, regardless of their objections to that procedure; their pending claims in U.S. courts were accordingly dismissed and sent to binding arbitration. Similarly, Mexico's exercise of diplomatic protection over Medellín's claim (along with that of the other Mexican nationals covered by the *Avena* proceeding) has necessarily produced conclusive legal effects as regards the rights of Medellín under the treaty invoked at the ICJ, which control the result within the U.S. legal system. Not only Mexico's rights on the interstate level, but Medellín's treaty-based rights in domestic law as well, have been conclusively determined through the procedure that produced the *Avena* judgment.

In the adversarial proceeding at the ICJ, Mexico produced evidence about the specific factual situations of the 51 individuals whose claims were presented, as set forth in the written pleadings and documents filed with the Court and the verbatim record of the oral hearings.[18] The United States had a full opportunity to dispute Mexico's presentation of Medellín's claim in its own written submissions and at the hearing in The Hague; indeed it not only put Mexico to its proof on each

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18. Application Instituting Proceedings, *Avena and Other Mexican Nationals* (Mex. v. U.S.), at 30-31, paras. 196-200 (Jan. 9, 2003); Memorial of Mexico, at 183 & A1192-A1212 (June 20, 2003); Letter from Mexico, Nov. 26, 2003, annex and appendix (Medellín's birth certificate and declaration); Verbatim Record, Dec. 15, 2003, 10:00 a.m., at 51 n. 54, 68 nn. 103-104, 70 n. 111; Dec. 18, 2003, 10:00 a.m., at 20 n. 19. The pleadings and record of the hearing are posted on the ICJ website, www.icj-cij.org.

individual's case but also contested specific facts and the inferences to be drawn from the facts.[19] The result of this adversarial contestation is a final judgment that articulates reasons for accepting some but not all of Mexico's submissions and that specifies the remedy with significant attention to U.S. concerns.[20] Claims of Mexican nationals that were fully litigated in The Hague are thus not open to reexamination in any U.S. forum in which the Vienna Convention rights of those 51 individuals might be called into question.

2. The United States Represented the Interests of Texas at the ICJ, and Texas Is Bound by the Result.

Article 34(1) of the ICJ Statute provides: "Only states may be parties in cases before the Court." Mexico therefore had to bring its suit against the United States as the relevant party to the ICJ Statute, the Vienna Convention, and the Optional Protocol. The United States is responsible in international law for the actions and omissions of states of the United States in violation of international obligations, *see* RESTATEMENT, § 207, Reporters' Note 3, and this responsibility extends to the determination by an international tribunal of liability for a violation.[21]

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19. Counter-Memorial of the United States at 71 n. 148, 155 n. 338, 186 n. 396; Verbatim Record, Dec. 16, 2003, 10:00 a.m., at 43 n. 41; Dec. 16, 2003, 3:00 p.m., at 39 n. 47.

20. For indications that the adversary process had a noticeable impact on the terms in which the operative provisions of the judgment were framed, see, *e.g.*, *Avena* at 60-61, 68-69, paras. 123, 127, 147-150 (explaining reasons for declining to order annulment of convictions, suppression of confessions, and cessation of continuing violation).

21. In the early 20th century, in preparation for arbitration with Mexico involving protection of nationals of one country in the other's territory, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of mirror-image considerations of U.S. federalism. The Department replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 G. HACKWORTH, DIGEST OF

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In ICJ practice, it has frequently been the case that the underlying claim involves actions or omissions of a subnational entity (including units of federal states) or other legal relationships in which the interests of a subnational unit are directly implicated. Several ICJ cases in which the United States has been party as applicant or respondent have been of this type. In *ELSI*, the United States as applicant complained of actions taken by authorities of a local government against a U.S. corporation and its Italian subsidiary; the international claim could be brought only against the state of Italy, even though it was the actions of local rather than national authorities that were challenged. In *Gulf of Maine (Delimitation of the Maritime Boundary in the Gulf of Maine Area)* (Can./U.S.), 1984 ICJ 246, the matter was submitted to the ICJ by a special agreement concluded by the two federal governments whose representatives pleaded and argued the case in The Hague. The boundary line drawn in the judgment is dispositive not only of the federal interests involved, but also of the rights of the several U.S. states and Canadian provinces in the disputed maritime area.[22]

The conclusion that Texas is bound by the *Avena* judgment is compelled not only as a matter of international law, but also by the decisions of this Court. *See, e.g., United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942) (state law must give way before superior federal policy evidenced in claims settlement agreement). In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court confirmed that a federal policy in favor of achieving "legal

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INTERNATIONAL LAW 593, 597 (1943) [HACKWORTH]. *See also* 2 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1421, 1439-40 (1898) ("[F]or treaty purposes the separate States are nonexistent.").

22. *Cf. United States v. California*, 332 U.S. 19, 35, 38-39 (1947) (confirming "paramount rights" of federal government in maritime zone and observing that "[t]he very oil about which the state and nation here contend might well become the subject of international dispute and settlement").

peace" with foreign governments had to prevail over a state law affecting the jurisdiction of state courts.[23] The structural constitutional logic by which this Court has consistently subordinated state interests to federal policy on international claims settlement applies equally to the federal government's acceptance of the international dispute settlement procedure that produced the *Avena* judgment.[24]

II. This Court Should Instruct The Courts Below To Fulfill U.S. Obligations Under The *Avena* Judgment.

A. The United States Has Continuing Obligations Within the ICJ Dispute Settlement System.

It is critical for the United States to uphold the obligatory character of judgments rendered under dispute settlement clauses to which it has agreed, in order to secure the benefits of compliance by other participants under comparable treaties. The United States was the first state to turn to the ICJ in a Vienna Convention dispute, when it brought an application against Iran concerning U.S. diplomatic and consular personnel held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol when disputes arise to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-52. When the ICJ indicated provisional measures in 1979 and entered judgment in 1980,

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23. Contrary to the views of four judges of the Texas court (Part III.B of the opinion below), *Garamendi*'s rationale does not require the conclusion of a separate executive agreement to carry out obligations that already exist under multiple Article II treaties, nor does international law require the national executive to enter into a redundant agreement.

24. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court invalidated a state law that had embroiled the national government for some time in an international dispute settlement procedure, even though those proceedings had been suspended by consent. *A fortiori*, in the face of a binding judgment from treaty-based dispute settlement, a state rule must not impede treaty compliance and a judicial remedy must be available.

the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[25] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[26] in total, the United States has been party to 21 cases at the ICJ,[27] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[28] Since each of the 70 treaties

25. *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. To the best of *Amici*'s knowledge, with only three exceptions (see below), all such treaties remain in force for the United States in 2007, as specified for each such treaty in the Department of State publication, TREATIES IN FORCE. Two treaties with ICJ clauses came into force for the United States after completion of the Morrison study: the Convention on the Physical Protection of Nuclear Materials, T.I.A.S. No. 11080 (in force Feb. 8, 1987), and the International Convention on the Taking of Hostages, T.I.A.S. No. 11081 (in force Jan. 6, 1985).

In 1985 the United States gave notice of termination of jurisdiction under the optional clause of Article 36(2) of the ICJ Statute and of a treaty of friendship with Nicaragua (the bases of jurisdiction involved in the *Nicaragua* case, note 30 *infra*, and in 2005 gave notice of withdrawal from the Optional Protocol under the Vienna Convention.

26. For a listing of all ICJ cases grouped by state, see the ICJ website at www.icj-cij.org.

27. The United States has also taken part in almost all proceedings for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions*, *in* CROSSROADS at 423; for a current listing, see ICJ Website.

28. The cases initiated by the United States include seven involving Soviet-bloc aerial incidents, as well as *Tehran Hostages* (Iran 1979-81), *Gulf of Maine* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89).

with an ICJ dispute settlement clause entails obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings.

The United States has a major stake in maintaining a record of abiding by the outcome of ICJ dispute settlement, not least because it continues to be active in that forum. Compliance with ICJ final judgments has generally been high, including in the cases in which the United States has been a party.[29] States have exceptionally disregarded ICJ rulings when they contested the Court's consensual jurisdiction, notably where respondents insisted that the ICJ had been granted no competence to decide a matter involving a state's vital security interests.[30] In the present

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29. Recent studies find compliance with two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period. *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (compliance rate of 60% with judgments issued in last 15 years; likelihood that rate would go up to 80% rate for prior periods in light of efforts to comply over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004) (overall compliance rate of 68%, counting disregard of provisional measures as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, *in* CROSSROADS at 288, 310-319 (only 5 cases of noncompliance with final judgments 1946-1986). The ICJ's current president observed that the ICJ's judgments are "almost invariably" complied with; out of 91 cases between 1946 and 2006, only 4 have presented compliance problems. *See* Judge Rosalyn Higgins, *Speech at U.N. University: The ICJ and the Rule of Law* 6 (Apr. 11, 2007), *available at* http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf).

30. See especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14, discussed at 24 *infra*. France denied the existence of proper ICJ jurisdiction in *Nuclear Tests* (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United

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case, by contrast, jurisdiction was by consent and no security interest would be prejudiced by compliance. Indeed, the President's memorandum on compliance with *Avena* confirms the national interest in fulfilling this international obligation.

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176, the United States and France promptly complied with the judgment, making known that it would be given full effect within the relevant jurisdictions.[31] In *Gulf of Maine* (Canada/ U.S.), 1984 ICJ 246, the final judgment drew a maritime boundary; both sides accepted the judgment and promptly complied with it.[32] In *ELSI*, 1989 ICJ 15, the United States

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States and France reacted to these cases by withdrawing from the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

31. The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM. J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco–Criminal Jurisdiction over U.S. Citizens– . . . –International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199, 221 n. 100 (1981) (French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary;" direct application of decision derived from French submission to ICJ jurisdiction).

32. Compliance having been assumed, only a few cases refer to the ICJ judgment. *See, e.g., Conde v. Starlight I, Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned); *Comeau's Sea Foods Ltd. v. Canada*
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embraced the ICJ forum as the last recourse of its diplomatic efforts and accepted the judgment as dispositive of the claims it had raised on behalf of U.S. investors.[33] Thus, apart from *Nicaragua* (addressed in Section II.B *infra*) and such continuing problems as may exist in the wake of *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments addressed to them, except for Iran in the *Tehran Hostages* case.[34]

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(Minister of Fisheries and Oceans), [1992] 3 F.C. 54 (Can. Fed. Ct.), *rev'd*, [1995] 2 F.C. 467, *aff'd*, [1997] 1 S.C.R. 12 (plaintiff sought fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485 (Can. Tax Ct.), paras. 142-147 (ICJ decision became available after arguments concluded).

33. *See* Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249, 257 (1990).

34. In addition to the cases discussed in the text and *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 466, which resulted in a final judgment against the United States after the individuals in question had already been executed, the disposition of the remainder of the 21 cases to which the United States has been party is as follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed for lack of an indispensable party. *Interhandel* (Switz. v. U.S.), 1959 ICJ 6, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugo. v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an *ex gratia* payment. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003

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In view of the U.S. interest in credible fulfillment of dispute settlement undertakings, this Court should ensure that the courts below uphold the U.S. obligations to carry out the final judgment in *Avena*.

B. The Obligation of U.S. Compliance Under U.N. Charter Article 94(1) Is Independent of the Procedure for Security Council Action Under Article 94(2).

Respondent has further contended that the *Avena* judgment has no legal force in Texas because the U.N. Charter provides for an "international" remedy – that is, the mechanism under Article 94(2) of the Charter for an aggrieved state to ask the Security Council for international measures to enforce an ICJ judgment. Brief in Opposition to the Petition for Certiorari (p. 16). This argument is based on a misunderstanding of the relationship between Articles 94(1) and 94(2) of the Charter. The binding judgment that resulted from the ICJ procedure does not require any Security Council action in order to bring about conclusive legal effects in both international and domestic law. The judgment can thus operate as a rule of decision in the courts of the respondent state, including the state of Texas in the present case.

It is neither required nor expected that the U.N. Security Council would exercise its powers under Article 94(2) of the U.N. Charter as a predicate for compliance with the judgment in domestic law or otherwise. As shown in Section II.A above, almost all litigants at the ICJ have carried out final judgments pursuant to Article 94(1), without the need for prevailing parties to invoke the mechanism of Article 94(2), which remains

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ICJ 152, was discontinued upon an overall settlement. *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 ICJ 426, was discontinued after provisional measures and before the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

available (subject to potential veto on the part of permanent members of the Security Council) as a last resort.

Under international law, each state decides within the framework of its own constitutional system how to carry out its international legal obligations. Respondent states have taken action within their own judicial systems to implement ICJ judgments involving national criminal jurisdiction, as Belgium did in the *Arrest Warrant* case.[35] The *Avena* judgment properly leaves it to the United States, "by means of its own choosing" (para. 153(9)) to determine how to put the judgment into effect. Within the U.S. constitutional system, one means to give effect to the *Avena* judgment, as confirmed by the President in his memorandum on compliance with *Avena*, is for state courts to apply it as binding federal law.

Because respondent states have generally complied with ICJ judgments in accordance with Article 94(1), resort to the Security Council has been exceedingly rare and no enforcement measure has ever been ordered under Article 94(2).[36] Only once

35. After the ICJ decision in *Arrest Warrant of 11 April 2000* (D.R. Congo v. Belg.), 2002 ICJ 3 (also known as *Yerodia*), holding that Belgium was required to cancel an arrest warrant for the sitting foreign minister of the Congo, Belgian courts canceled the warrant in that case and other similar prosecutions. *See* Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003); Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-07 (2003) (Belgian court decisions terminating prosecutions following ICJ ruling altered outcomes from what advocates had expected under preexisting understandings of legal doctrine and legislative intent).

36. *See* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 38-62, 417-18 (2004). In a few cases, the prevailing party refrained from pressing its case at the Security Council because a permanent member had made known that it would veto such a proposal. This was the case during the Tehran hostage crisis, when the Soviet Union had already been blocking U.S. proposals for U.N.-mandated sanctions against Iran; a Soviet veto of any measure under Article 94(2) to enforce the ICJ's 1980 final judgment against Iran was therefore seen as inevitable. *Id.* at 315.

did a prevailing party formally invoke the Article 94(2) procedure to seek enforcement of a final judgment – *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14 – which resulted in a U.S veto.[37] That situation was quite different from the present one, however, for the reason (among others) that the United States had consistently denied the ICJ's jurisdiction over the matter and considered the dispute to involve its security interests.[38] The hypothetical availability of the Article 94(2) procedure surely does not require Mexico to pursue that route where, as here, the President accepts the obligation of compliance under Article 94(1) and has indicated a proper domestic forum through which compliance should take place.

In this case of first impression, in which the federal policy clearly favors judicial implementation of an acknowledged international obligation, this Court should view the President's decision as an appropriate step in the sequence of domestic measures through which the United States, "by means of its own choosing," has determined to carry out its international obligations. It now remains only for this Court to remove any impediments to compliance which may have arisen from the lower court's misinterpretation of this Court's previous rulings or misunderstanding of the relationship between treaty obligations and domestic law.

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37. The fact of that veto was part of the context in which a lower federal court held that an ICJ judgment was not enforceable in domestic courts. *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-38 (D.C. Cir. 1988).

38. *See* text at note 30 *supra*. The ICJ's *Nicaragua* judgment entailed aspects of international law (use of military force) that are generally considered nonjusticiable in U.S. law. The plaintiffs who sought to enforce the *Nicaragua* judgment were strangers to the ICJ case, *see* 859 F.2d at 938, while *Avena* explicitly deals with petitioner's situation and specifies the remedy for his claims under a self-executing treaty. Also, Congress and the President had repudiated the *Nicaragua* judgment in a subsequent conflicting statute, which the court of appeals found controlling. *See* 859 F.2d at 936-37. Here, no statute rejects *Avena*, and the President has formally endorsed compliance through state courts.

C. This Court Should Resolve Any Open Questions in a Manner That Will Allow the United States to Fulfill Its International Obligations and Achieve Final Settlement of the Dispute With Mexico.

For more than two centuries, this Court's decisions have shown appropriate regard for fulfillment of the international obligations of the United States. *See, e.g., Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004). Just as an act of Congress ought never to be construed to place the United States in violation of international law if any other possible construction remains, *Charming Betsy* at 118, this Court should exercise its independent constitutional judgment to resolve any doubt about the authority and duty of state courts to implement treaty obligations that the federal political branches freely accepted and want to honor. The presumption in favor of compliance with international obligations will also put to rest a long-festering dispute with one of our closest neighbors.

Prior to the Vienna Convention, disagreements over the treatment of U.S. nationals in Mexico and Mexican nationals in the United States – including instances of denial of consular access – frequently led to diplomatic protests and international arbitration.[39] Codification of consular law in the Vienna

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39. *See* 4 HACKWORTH 830-837 (1942); 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 626-658 (1970) [WHITEMAN], 8 WHITEMAN 807-837. In the 1920s, a U.S.-Mexican claims commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given [the] opportunity" of consular access. *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 HACKWORTH 830. Conversely, where California officials did not give the Mexican consulate access to a detained Mexican citizen, the Department of State stressed the importance of California's compliance with standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be

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Convention has produced greater certainty of substantive rules in consular matters,[40] and the creation of a multilateral mechanism for binding settlement of consular disputes in the Optional Protocol obviated the need for a special arbitration agreement between the United States and Mexico to resolve a consular dispute.[41] The United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969,[42] and Mexico's subsequent acceptance of the same obligation created the necessary consent-based reciprocity for

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> permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 HACKWORTH 836.

40. Codification of consular law was undertaken by the U.N. International Law Commission and a diplomatic conference. *See* 1961-II Y.B. INT'L L. COMM'N 88-128. The United States played a leading role in negotiating the specific wording of Article 36 of the Convention and the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation].

41. The United States actively advocated the provision that became the Optional Protocol and resisted others' efforts to eliminate or weaken dispute settlement. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States, was an Optional Protocol that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid.*

42. Withdrawal from the Optional Protocol does not affect the U.S. obligation to abide by the *Avena* judgment. At the same time as the announcement of withdrawal from the Protocol, the United States reaffirmed its commitment to comply with the *Avena* judgment. The State Department spokesman said (in response to a question): "The bottom line is we believe in the international system, we are committed participants in the international system, as reflected by . . . our decision to comply with the judgment." Dep't of State Daily Press Briefing (Mar. 10, 2005), *available at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm.

either state to sue the other on any dispute involving interpretation or application of the Convention.

No state can unilaterally determine the definitive meaning of an international treaty.[43] Thus, in a dispute under the Vienna Convention, the United States cannot impose its own view on Mexico (or on any other treaty partner),[44] or establish the measure of its own treaty compliance. Nor can disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach, be determined by the United States as one party to the dispute. In this case, the United States agreed that the ICJ would be the decision-maker.

The jurisprudence of this Court accepts the authority of the federal government to settle disputes with foreign governments in a manner that binds state as well as federal courts. In *Belmont*, *Pink*, and *Garamendi*, this Court found that the federal policy of the United States adopted in the context of definitive resolution of long-festering disputes would displace contrary state law. In *Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that dispute settlement procedures

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43. *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (British court decision could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). *See also Mitsubishi*, 473 U.S. at 629; *Bremen*, 407 U.S. at 9 (U.S. courts should not "insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have [international dealings] exclusively on our terms, governed by our laws, and resolved in our courts.").

44. For this reason, U.S. courts ought to give careful consideration to judgments of foreign or international courts in treaty cases. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, it is not open to a state court to reexamine the questions resolved in the international judgment. *Cf. Medellín v. Dretke*, 544 U.S. 660, 662, 670-71 (2005) (Ginsburg, J., concurring).

accepted by the U.S. political branches are a traditional and proper method for resolving such grievances. Whatever might be the limits of federal authority to resolve disputes with foreign governments in some hypothetical scenario not involved here, it falls clearly within the core of federal power under the Constitution to accept the outcome of a treaty-based dispute resolution process as definitively settling a dispute over treatment of foreign nationals by the states and for this Court to ensure that state courts carry out the treaty-based judgment.

Refusal to grant review and reconsideration of petitioner's conviction and sentence as required by the ICJ would compound the treaty violation that occurred when the Texas authorities failed to inform petitioner of his right to communicate with the Mexican consulate. Such a refusal to accord this treaty-based remedy for a treaty violation would prejudice the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention toward the millions of U.S. nationals who visit or work in Mexico and in the other 169 parties to the Convention.[45]

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45. On rare occasions of U.S. failure to implement obligations resulting from dispute settlement (as with prolonged noncompliance with the *Chamizal* arbitral award in Mexico's favor), detriments to U.S. economic and political interests are well-documented. *See* SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964 68-69, 75-77, 86-88, 95-97, 100-03 (1965); ANTONIO GÓMEZ ROBLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (problems in negotiating with Mexico over expropriation of U.S. properties, in view of noncompliance with *Chamizal* award); FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President Kennedy said that because of the U.S. refusal on *Chamizal*, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

Ultimately, it is the decision of this Court that must have conclusive effect under the Constitution.[46] It would be a justified assertion of the role of this Court, within our constitutional system of federalism and separation of powers, for the Court to exercise the federal judicial power to give effect to the legal obligations of the United States embodied in the *Avena* judgment.

CONCLUSION

Amici urge this Court to ensure that actions and omissions of the state of Texas are remedied by the courts of that state, as the proper organs to bring about compliance with the *Avena* judgment. Refusal to grant the remedy for the Vienna Convention violations that has been determined by the ICJ in its judgment regarding petitioner's treaty claims would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention. Review and reconsideration of petitioner's conviction and sentence is necessary to avoid the adverse consequences that would result from failure to comply with the *Avena* judgment, which could include prejudice in connection with dispute settlement under other treaties.

By remanding with instructions to afford the remedy of review and reconsideration to redress the violation of the treaty as required by the *Avena* judgment, this Court would fulfill its responsibility within our constitutional system and would sustain compliance with the international obligations of the United States.

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46. *See* RESTATEMENT, § 112(2) ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States") and comment *a*.

Respectfully submitted,

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APPENDIX

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Appendix A

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Appendix A

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Stephen M. Schwebel was a judge of the International Court of Justice from 1981 to 2000 and its president from 1997 to 2000. Previously he served for fourteen years in the Office of the Legal Adviser of the U.S. Department of State, including as Assistant Legal Adviser and Deputy Legal Adviser, in which offices he represented the United States in the *Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3; and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

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No. 06-984

In The
Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Respondent. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the Nation, including Texas.

MSLF has been actively involved in litigation aimed at securing the proper interpretation of the Constitution in accordance with the Framers' intent, including *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), *Mountain States Legal Foundation v. National Wildlife Federation*,

[1] A copy of the consent letter received from Respondent has been filed with the Clerk of the Court; the Petitioner has filed a general consent with the Clerk. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

497 U.S. 1020 (1990), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

STATEMENT OF THE CASE

On June 24, 1993, José Ernesto Medellín, a Mexican national, raped and murdered two young teenage girls in Houston, Texas. Medellín confessed, was convicted of murder during the course of a sexual assault, and sentenced to death. At the time of the trial, Medellín, who was represented by two court-appointed attorneys, was not aware of, and did not assert any claim under the Vienna Convention, which requires, *inter alia*, that detaining authorities notify a detained foreign national of his right to request assistance from the consul of his own country. After his conviction was affirmed by the Texas Court of Criminal Appeals in an unpublished order, Medellín contacted the Mexican consulate. Shortly thereafter, consular authorities filed an application for *habeas corpus* on Medellín's behalf in Texas state court in which Medellín alleged, for the first time, a violation of his rights under the Vienna Convention. This application was denied, and, in an unpublished order dated September 7, 2001, the Texas Court of Criminal Appeals again affirmed.

On November 28, 2001, Medellín filed a petition for a *writ* of *habeas corpus* in federal court in which he, again, alleged Vienna Convention violations. *See Medellín v. Cockrell*, No. H-01-4078 (S.D. Tex. June 25, 2003). On June 26, 2003, the federal district court rejected the petition, holding that Medellín's failure to raise his Vienna Convention claim at trial, as required by Texas' contemporaneous-objection rule, barred federal *habeas* review. *Id.*

This decision was appealed to the Fifth Circuit Court of Appeals. *See Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

Meanwhile, in early 2003, Mexico initiated proceedings against the United States in the International Court of Justice (ICJ) in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 12 (hereafter "*Avena*"), alleging a violation of the Vienna Convention rights of 52 Mexican nationals, including Medellín. The ICJ held, *inter alia*, that the United States had violated the Vienna Convention by failing to notify the detained Mexican nationals of their right to consult the Mexican consul. *Id.* The ICJ further held that Medellín was entitled to a review and reconsideration of his conviction, and that procedural *habeas corpus* rules could not bar such review and reconsideration. *Id.*

Although the Fifth Circuit acknowledged the recently-released *Avena* judgment, it held, *inter alia*, that it was bound by *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*), in which this Court held that Vienna Convention claims are subject to procedural default rules. *Medellín v. Dretke*, 371 F.3d 270. Therefore, the Fifth Circuit affirmed the denial of *habeas corpus* relief, and Medellín subsequently petitioned this Court for *certiorari*, which was granted on December 10, 2004.

While the case was pending before this Court, President Bush issued a "Memorandum for the Attorney General," which proclaimed that "State courts give effect to the [*Avena*] decision in accordance with general principles of comity. . . ." Pet. App. 187a. Thereafter, Medellín filed another application for a *writ* of *habeas corpus* in Texas state court. Based in part on the presidential

memorandum, and in part on the filing of Medellín's new state *habeas corpus* application, this Court dismissed the *writ* of *certiorari* as improvidently granted. *Medellín v. Dretke*, 544 U.S. 660 (2005).

In his state *habeas corpus* application, Medellín argued, *inter alia*, that both the *Avena* decision and the executive memorandum supersede Texas' *habeas corpus* rules, which would otherwise bar Medellín from raising his *habeas corpus* arguments. However, the Texas Court of Criminal Appeals, citing *Sanches-Llamas v. Oregon*, __ U.S. __, 126 S.Ct. 2669 (2006), held that *Avena* does not preempt Texas' *habeas corpus* rules. Additionally, a plurality of the court concluded that the executive memorandum does not preempt Texas' procedural rules. *Ex parte Medellín*, 206 S.W.3d 584 (Tex. Crim. App. 2005). Thereafter, Medellín petitioned this Court for *certiorari*, which was granted on April 30, 2007. *Medellín v. Texas*, __ U.S. __, 127 S.Ct. 2129 (2007).

SUMMARY OF THE ARGUMENT

Under Article III of the U.S. Constitution, the judicial power is vested solely in U.S. courts. Both the ICJ and the U.S. Supreme Court have interpreted the Vienna Convention, and have reached differing opinions as to whether the Vienna Convention requires state courts to ignore their *habeas corpus* procedural rules. Medellín alleges that Texas courts are compelled to adopt the ICJ's interpretation of the Vienna Convention, even if doing so would require the Texas courts to ignore this Court's own interpretations of the Vienna Convention in *Breard* and *Sanches-Llamas*. This Court should reject Medellín's

arguments because, pursuant to Article III, an international tribunal lacks the power to interpret treaties entered into by the United States.

Medellín also alleges that President Bush's memorandum compels Texas courts to "give effect" to the ICJ's decision in *Avena*. This argument also should be rejected because in issuing the memorandum the President exceeded his Article II power. Specifically, his actions were both *ultra-vires* and an infringement upon the constitutional doctrines of separation of powers and a limited federal government.

ARGUMENT

I. ARTICLE III OF THE CONSTITUTION PROHIBITS THE PRESIDENT, WITH THE ADVICE AND CONSENT OF THE SENATE, FROM CONFERRING JURISDICTION OVER TREATIES TO AN INTERNATIONAL TRIBUNAL.

A. Article III Is An Absolute Prohibition Against Vesting The Power To Interpret Treaties In The ICJ.

At the time of the *Avena* judgment, the United States was a party to the Optional Protocol to the Vienna Convention.[2] Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820. This Optional

[2] The United States has since withdrawn from the Optional Protocol. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005) (giving notice of United States' withdrawal from the Optional Protocol).

Protocol provided, *inter alia*, that the ICJ would have exclusive "compulsory jurisdiction" over "the interpretation or application" of the Vienna Convention in all cases brought by a party to the Convention. *Id.*

Medellín argues that, because the United States has a treaty obligation to give effect to ICJ judgments interpreting the Vienna Convention, state courts are bound by ICJ opinions pursuant to the Supremacy Clause. Brief For Petitioner at 26-28. This contention assumes that the President, with the advice and consent of the Senate, has the power to confer jurisdiction over treaties to the ICJ. Under Article III of the Constitution, however, the President lacks such power.

Article III provides that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. "The language of Article III itself, of course, admits of no exceptions. . . ." *Granfinanciera v. Nordberg*, 492 U.S. 33, 66 (1989) (Scalia, J., concurring). This particular clause of Article III prohibits the President from transferring jurisdiction to other, non-Article III tribunals "'for the purpose of emasculating' constitutional courts. . . ." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 850 (1986) (holding that a statutory grant of power to a commission to hear certain state law counterclaims does not violate Article III.) (citing *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

The purpose of this strict separation of the judicial power from the executive and legislative branches is well known. "The Framers knew that '[t]he accumulation of all

powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Schor*, 478 U.S. at 859-60 (Brennan, J., dissenting) (citing *The Federalist* No. 46 (James Madison)). "The Framers also understood that a principal benefit of the separation of the judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures." *Id.* at 860. To that end, once confirmed, a justice serves a life-term. U.S. Const. art. III, § 1. "[T]he Framers of the Constitution believed that those protections were necessary in order to guarantee that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures and thus able to enforce constitutional principles without fear of reprisal or public rebuke." *U.S. v. Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting) (citing *The Federalist* Nos. 78, 79 (Alexander Hamilton)); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion); *O'Donoghue v. U.S.*, 289 U.S. 516, 530 (1933). Likewise, Hamilton explained that the Supreme Court would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *Roper v. Simmons*, 543 U.S. 551, 607-08 (2003) (Scalia, J., dissenting) (citing *The Federalist* No. 78 (Alexander Hamilton)).

In contrast, the United Nations charter annexes the Statute of the ICJ (U.N. Charter art. 92), which, in turn, provides that ICJ judges are elected by the General Assembly and the Security Council to nine-year terms, Statute of the ICJ, art. 4, and may be re-elected. *Id.*, art. 13. Therefore, an ICJ judge who ascribes to an opinion,

deemed unpopular by certain foreign countries, could ultimately lose his re-election bid as a result of the votes of certain U.N. ambassadors who may be subject to majoritarian pressures. Not only does this voting process hamstring the independence of the ICJ, but also the voting member nations may not have the best interests of the United States or the fidelity of the U.S. Constitution at heart.

Furthermore, rather than being bound by precedent, the decisions rendered by the ICJ have "no binding force except between the parties and in respect of that particular case." *Id.*, art. 59. Thus, the ICJ lacks some of the most fundamental principles that underscore the American judiciary; "[t]hese important functions of Article III are too central to our constitutional scheme to risk their incremental erosion." *Schor*, 478 U.S. at 861 (Brennan, J., dissenting). As Justice O'Connor once advised:

> [T]he vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal "the essential attributes of judicial power."

Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U.J. Int'l L. & Pol. 35, 42 (1995) quoting *Schor*, 478 U.S. at 851. While the outer limits of "the essential attributes of judicial power" may be arguable, "no power is more clearly conferred by the Constitution and laws of the United States, than the power of this [C]ourt to decide, ultimately and finally, all cases arising under such Constitution and laws. . . ." *Ableman v. Booth*, 62 U.S. 506, 525

(1858); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Such an "essential attribute[]" of judicial power "extend[s] to all Cases, in Law and Equity, arising under . . . Treaties. . . ." U.S. Const. art. III, § 2. Thus, the Constitution explicitly grants the federal judicial branch the sole authority to interpret treaties, and any attempt by the President to subordinate this Court to ICJ interpretations of treaties is unconstitutional. This Court has correctly held, therefore, that ICJ decisions interpreting treaties, such as the Vienna Convention, are entitled only to "respectful consideration" by this Court as it fulfills its constitutional obligation to interpret such treaties. *Sanchez-Llamas v. Oregon*, ___ U.S. ___, 126 S.Ct. 2669, 2683 (2006) (citing *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

B. Assuming, *Arguendo*, That The Judicial Power, Under Rare Circumstances, May Be Vested In Non-Article III Courts, Those Rare Circumstances Do Not Include The Vesting Of Judicial Powers In The ICJ.

Even if this Court were to hold that Article III does not absolutely proscribe the vesting of judicial powers in non-Article III courts, the President would still lack the authority to vest jurisdiction over the Vienna Convention in the ICJ. Although, "[o]n its face, Article III, § 1 seems to prohibit the vesting of any judicial functions in [non-Article III courts,] [t]he Court has [] recognized three narrow exceptions to the otherwise absolute mandate of Article III: territorial courts . . . courts-martial . . . and courts that adjudicate certain disputes concerning public rights. . . ." *Commodity Futures Trading Comm'n*, 478 U.S.

at 859 (Brennan, J., dissenting) (internal citations omitted).[3] None of these narrow exceptions can be applied to permit the President to vest the ICJ with supreme and exclusive jurisdiction over treaties ratified by the United States and adopted into American law.

Territorial courts, which do not possess Article III protections, have been held constitutional "in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (referring to U.S. Const. art. IV, § 3) *see also McAllister v. U.S.*, 141 U.S. 174, 184 (1891) ("It must be regarded as settled that courts in the territories [are] created under the plenary municipal authority that [C]ongress possesses over the territories of the United States, [and] are not courts of the United States created under the authority conferred by [Article III].").

In contrast, while the President has significant power over foreign relations (*see U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)), his power over the rest of the world is far from plenary. Specifically, the President

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[3] Under a fourth exception, this Court has permitted the vesting of Article III powers in a non-Article III court so long as it is an "adjunct" to an Article III court. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion of Brennan, J., and concurrence of Rehnquist, J.); *U.S. v. Raddatz*, 447 U.S. 667 (1980); *Crowell v. Benson*, 285 U.S. 22 (1932). Medellín is not arguing, however, that the ICJ is merely an adjunct of the federal courts. Had he made such an argument, he would, in effect, be conceding that this Court's holdings in *Sanchez-Llamas* and *Breard* – that ICJ opinions are only to be given "respectful consideration" – would control.

may not "make all needful rules and regulations" over the rest of the world that might enable him to vest the judicial power in a non-Article III court, such as the ICJ. Even assuming, *arguendo*, that the President's broad foreign relations power grants him the authority to bind the United States in disputes that arise outside the nation's borders to any needful rules or regulations agreed upon by other nations, he surely may not bargain away the Article III protections of those to whom the Constitution applies: "citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere. . . ." *Ross v. McIntyre*, 140 U.S. 453, 464 (1891). Interpreting the Constitution to permit such an egregious aggrandizement of domestic power could jeopardize the entire constitutional structure. *See* Section II, *infra*.

Similarly, this Court has held that Congress may vest the judicial power in military courts, which lack Article III protections, pursuant to Congress's expressed powers to "provide and maintain a navy[,]" and to "make rules for the government and regulation of the land and naval forces." *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 71 (1857) (citing U.S. Const. art. I, § 8, cl. 13-14). However, it cannot be legitimately argued that such congressional powers also enable the President to vest the ICJ with Article III judicial powers.

Under the third narrow exception, a non-Article III court may adjudicate "public rights." *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (plurality opinion of Brennan, J.) (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)). For a right to be deemed public, it must either (1) "arise between the Government and persons subject to its authority" (*Atlas Roofing Co. v.*

Occupational Safety and Health Review Comm'n, 430 U.S. 442, 450 (1977)), or (2) be "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution. . . ." *Granfinanciera*, 492 U.S. at 54.[4] "In essence, the public rights doctrine reflects simply a pragmatic understanding that, when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 589 (1985).

Cases before the ICJ meet none of these public rights criteria. Pursuant to Article 34(1) *Statute of the ICJ*, "Only states [*i.e.*, nations] may be parties in cases before the Court." Thus, at no time would a case before the ICJ arise between any government and persons subject to its authority.[5] Nor are ICJ interpretations of treaties mere administrative endeavors that "could be conclusively determined by the Executive and Legislative Branches." Instead, treaty interpretations are reserved exclusively to the judicial branch. *See* Section I(A), *supra*.

Though recent decisions by this Court are unclear, it has been argued that a balancing test, weighing a number of factors, none of which is dispositive, should be used to determine whether Article III powers may be vested in a

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[4] An independent judiciary is particularly essential in "public rights" cases between the government and a private citizen, making the Article III protections especially indispensable in such cases.

[5] Although treaties "generally do not create private rights . . . " (Restatement (Third) of Foreign Relations Law of the United States § 907 (comment (a)), the public rights created by treaties are not the type of public rights for which the "narrow exception" was crafted.

non-Article III court. *See Schor*, 478 U.S. at 851. One such factor cited by this Court gives consideration to "the concerns that drove Congress to depart from the requirements of Article III." *Id.* However, as Justice Scalia explained:

> [O]ne can[not] preserve a system of separation of powers on the basis of such intuitive judgments regarding "practical effects," no more with regard to the assigned functions of the courts, *see Mistretta v. United States*, 488 U.S. 361 [] (1989) (Scalia, J., dissenting), than with regard to the assigned functions of the Executive, *see Morrison v. Olson*, 487 U.S. 654 [] (1988) (Scalia, J., dissenting). This central feature of the Constitution must be anchored in rules, not set adrift in some multifactored "balancing test" – and especially not in a test that contains as its last and most revealing factor "the concerns that drove Congress to depart from the requirements of Article III." *Schor, supra*, 478 U.S., at 851 [].

Granfinanciera, 492 U.S. at 70 (Scalia, J., concurring). Instead, the vesting of the judicial power in non-Article III tribunals should be "limit[ed] . . . to [those] few, long-established exceptions." *Schor*, 478 U.S. at 859 (Brennan, J., dissenting). By vesting the power to interpret treaties in the ICJ, the President did not act pursuant to any of these narrow exceptions. As a result, his action was unconstitutional.

II. THE PRESIDENT DOES NOT HAVE THE POWER TO RULE BY DECREE ON DOMESTIC ISSUES.

It has been said that, pursuant to Article II of the Constitution, the President is the "sole organ" and has

plenary power over "international relations." *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Although the President clearly has "a degree of independent authority to act" with regard to foreign relations, *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), the plain language of the Constitution reveals that it is not entirely accurate to describe his powers as plenary. Indeed, the Constitution enumerates certain powers in the international sphere to Congress. For example, Congress has the power to "provide for the common Defence" and impose "Duties, Imposts and Excises," U.S. Const. art. I, § 8, cl. 1; "regulate Commerce with foreign nations," *id.* cl. 3; "establish a uniform Rule of Naturalization," *id.* cl. 4; "regulate the Value . . . of foreign Coin," *id.* cl. 5; "declare War," *id.* cl. 11; "raise and support Armies," *id.* cl. 12; "provide and maintain a Navy," *id.* cl. 13; and "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14. Furthermore, the President can "make Treaties" only with the advice and consent of two-thirds of the Senate, *id.* art. II, § 2, and shall "appoint Ambassadors, other public Ministers and Consuls" with the "Advice and Consent of the Senate." *Id.* Importantly, Congress alone has the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* art. I, § 8, cl. 18.

These foreign relations powers were delegated expressly to Congress to ensure a system of separation of powers and checks and balances. *See* Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 260-61 (2001). Indeed, there is little doubt that one of the most fundamental

principles enshrined in the Constitution is that of separation of powers. *See Mistretta*, 488 U.S. at 380 ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."). James Madison, "in writing about the principle of separated powers, said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" *Id.* (citing *The Federalist* No. 47 (James Madison)). A system of checks and balances was built into the Constitution to protect this separation of powers. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The ultimate purpose behind this separation of powers was to protect individual liberties from a tyrannical government. *Loving v. U.S.*, 517 U.S. 748, 756 (1996) (citing Montesquieu, *The Spirit of the Laws* 151-52 (T. Nugent transl. 1949)).

This is particularly true in the realm of foreign relations, as Alexander Hamilton explained:

> [T]he vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them . . . [I]t would be utterly unsafe and improper to intrust [the power of making treaties] to an elective magistrate . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States. It must

> indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either . . .

Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133, 160-61 (1998) (citing *The Federalist* No. 75 (Alexander Hamilton)).

Likewise, James Wilson, perhaps the "most learned and profound" of all the framers (Robert Green McCloskey, *Introduction to the Works of James Wilson* 2 (Robert Green McCloskey ed., 1967)), observed that "neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." 2 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 507 (1836 ed.) (statement of James Wilson to the Pennsylvania ratifying convention).

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also The Federalist* No. 51 (James Madison) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.

Hence a double security arises to the rights of the people."). Thus, the framers created a limited government of enumerated powers, with the residual powers left with the States. U.S. Const. amend. X; *Alden v. Maine*, 527 U.S. 706, 713-14 (1999); *see also Sabri v. U.S.*, 541 U.S. 600, 611 (2004) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 423 (1819)).

In this case, the President addressed a memorandum to the Attorney General mandating that all "State courts give effect" to the ICJ opinion. Assuming, *arguendo*, that this memorandum constitutes either an executive order or an executive proclamation, the authority of the President must be scrutinized carefully. "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Respondents, in their brief, have explained thoroughly why there is no expressed or implied congressional authorization for this executive order. Respondent's Br. in Opp., 19-21. Therefore, the President must derive his authority solely from the Constitution. Indeed, in *Medellín v. Dretke*, the United States, in its *amicus curiae* brief, has argued that the President's authority to issue his directive rests, at least in part, "on the President's authority under Article II of the Constitution to manage foreign affairs." Br. For U.S. as *Amicus Curiae* at 44, *Medellín v. Dretke*, *supra*; *see also* Brief For Petitioner at 28-41; Br. For U.S. as *Amicus Curiae* at 12-13.

Clearly, though, the President cannot rule domestically by fiat, simply by relating the decree, even tangentially, to foreign affairs. *See Youngstown*, 343 U.S. at 587 (in the context of foreign relations, "the President's power to see that the laws are faithfully executed refutes the idea

that he is to be a lawmaker."); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2773 (2006) ("'The power to make the necessary laws is in the Congress; the power to execute in the President.'") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866)). Interpreting the Constitution to grant such power would undermine both the notions of a limited federal government and of separation of powers. Instead, there must be some line drawn delineating what the President may do domestically, pursuant to his foreign relations power, and what domestic activities exceed the scope of his power.

By returning to the text of the Constitution, and its fundamental principles of separation of powers and a limited federal government, such a distinction may be discerned. The only enumerated power that could, theoretically, grant the President the authority to issue such a domestic directive is Article II, § 3, under which the President has a duty to "faithfully execute[]"[6] the laws of the land, which, pursuant to Article VI, § 2, includes treaties.

This Court has recognized that treaties can be either self-executing or non-self-executing:

> When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by [C]ongress as legislation upon any other subject.

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[6] It is likely the Framers and their contemporaries defined the execution of the laws as "performing" the law or "to put in act the laws." Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267 n.84 (citing Samuel Johnson, *A Dictionary of the English Language* (7th ed. 1785)).

> If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

Whitney v. Robertson, 124 U.S. 190, 194 (1888).[7]

When a treaty is not self-executing, there is no domestic component to execute faithfully. It follows, then, that the President lacks the power to dictate domestic law pursuant to a non-self-executing treaty. Therefore, as to the Vienna Convention, the question is whether the provision that President Bush is attempting to execute is self-executing.[8] If the treaty is non-self-executing, the President clearly exceeded the scope of his power by issuing the memorandum. Simply put, because no law would exist to execute, the President would, in effect, be making new law, violating the doctrine of separation of powers.

On the other hand, if the Vienna Convention is self-executing, the President may "put in act" the law by executing the domestic component of the law. In such a

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[7] The power to enact such implementing legislation is vested in Congress, U.S. Const. art. 1, § 8, cl. 18 (Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."), and that power is checked by the President. *Id.* § 7.

[8] Notwithstanding this Court's holdings in *U.S. v. Belmont*, 301 U.S. 324 (1937), *U.S. v. Pink*, 315 U.S. 203 (1942), *Dames & Moore v. Regan*, 435 U.S. 654 (1981), and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), executive agreements may never be self-executing without seriously impinging on the doctrines of separation of powers and a limited federal government. To hold otherwise would empower the President to dictate domestic law without any "check" by two-thirds of the Senate, or by Congress as a whole.

case, the issuance of the President's memorandum must be interpreted as an execution of a Vienna Convention provision providing for preemption of state procedural laws. However, no such provision exists in the Vienna Convention, contrary to the non-binding opinion of the ICJ.

It is, of course, well established that the judicial power, which extends to treaties, is vested in the Supreme Court. U.S. Const. art. III, §§ 1-2; *see* Section I, *supra*. "And, as Chief Justice Marshall famously explained, that judicial power includes the duty to 'say what the law is.'" *Sanchez-Llamas*, 126 S.Ct. at 2684 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

This Court has interpreted the Vienna Convention as being *subject to* domestic procedural rules. *Sanchez-Llamas*, 126 S.Ct. at 2687. Therefore, the President, with his memorandum, is attempting to execute a provision in a law that this Court has refused to recognize. Furthermore, the President is attempting to execute a law in a manner contrary to this Court's interpretation of that law, which usurps the power of this Court and violates the doctrine of separation of powers.

Ultimately, regardless of whether the President relies on his general foreign relations power or on his power to execute treaties, his executive decree flagrantly violates bedrock principles in the Constitution, the separation of powers and a limited federal government.

CONCLUSION

Because the Constitution expressly delegates the judicial power to courts that provide certain Article III protections, any attempt by the President, with the advice and consent of the Senate, to vest the judicial power in the ICJ, which lacks such Article III protections, is *ultra-vires*. Therefore, this Court should hold that the *Avena* judgment of the ICJ does not bind domestic courts. Additionally, this Court should hold that the President exceeded his constitutional foreign affairs authority and undermined essential constitutional doctrines by issuing his executive decree.

Respectfully submitted,

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Submitted August 22, 2007

FILED
AUG 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-984

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF WASHINGTON LEGAL FOUNDATION, RANDY AND SANDRA ERTMAN, AND ALLIED EDUCATIONAL FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amici curiae address the following issues only:

1. May the federal government commandeer the courts of the State of Texas and require them, in violation of Texas law, to exercise jurisdiction over Petitioner's collateral challenge to his criminal conviction and sentence, despite the availability of federal courts with jurisdiction to hear that challenge?

2. Have the Texas courts already adequately considered Petitioner's claim that he was prejudiced by the failure of law enforcement officials to inform him of his rights under the Vienna Convention?

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21 U.S.T. 77, 596 U.N.T.S. 261 ..... *passim*
Article 36 16
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Miscellaneous:

Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489 (1954) 20

The Federalist (C. Rossiter ed. 1961) 10, 14, 19

BRIEF OF WASHINGTON LEGAL FOUNDATION, RANDY AND SANDRA ERTMAN, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states.[1] WLF devotes a significant portion of its resources to promoting the rights of crime victims and has regularly appeared before this Court and other courts to advocate for greater judicial recognition of those rights as well as the need to streamline appellate review of criminal sentences. *See, e.g., Lynn v. Gathers, cert. denied* 540 U.S. 1141 (2004); *Felker v. Turpin*, 518 U.S. 65 (1996); *Payne v. Tennessee*, 501 U.S. 808 (1991). WLF filed a brief in support of Respondent when this case first came before the Court in 2005. WLF has also appeared before this Court in support of its view that federal courts should base their decisions on international law only to the extent that Congress has decided to incorporate that international law as part of our domestic law. *See, e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

Randy and Sandra Ertman are the parents of Jennifer Lee Ertman, one of the two teenage girls who were brutally raped and murdered by Petitioner. Mr. and Mrs. Ertman have endured more than 13 years of appellate review of Petitioner's conviction and sentence and believe that it is time to bring that review to an end. The Ertmans attended each of the trials of their daughter's killers; they were granted the opportunity to

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

address the defendants at the conclusion of several of those proceedings and to describe the tremendous impact that their daughter's murder has had on the lives of her surviving relatives.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici oppose efforts by the federal government to require Texas courts to expand their jurisdiction in order to hear collateral challenges to criminal convictions that, under longstanding Texas law, are not subject to challenge in Texas courts. Throughout our nation's history, the federal government has respected the right of state courts to establish their own procedures for the orderly administration of justice. One particularly venerable procedural rule is the contemporaneous objection rule, which virtually every State employs to bar a convicted criminal from basing a collateral challenge to his conviction on grounds which he could have raised at trial but failed to do so. *Amici* believe that federal government efforts to abrogate that rule in this case amount to an unconstitutional commandeering of the resources of a State court.[2]

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[2]*Amici* do not address the Texas Court of Criminal Appeals's alternative basis for its ruling: that even if the federal government in some instances possesses the authority to order Texas courts to expand their jurisdiction, the President did not properly invoke that authority in this case.

Amici are also concerned that continued delay does not serve the ends of justice. Petitioner's substantive claim (that he was prejudiced by the failure of law enforcement officials to inform him of his Vienna Convention rights) was considered and rejected by the Texas courts more than six years ago. The International Court of Justice (ICJ) has never indicated any dissatisfaction with the manner in which the Texas courts addressed that claim of prejudice. Yet, an end to Petitioner's appeals is nowhere in sight. *Amici* believe that in the absence of any meaningful evidence that Petitioner was prejudiced by the failure to inform him of his right to contact Mexican consular officials, a failure of which his trial counsel was fully aware yet chose not to mention at trial, justice can only be served by a decision rejecting once and for all his efforts to obtain relief in the Texas state courts.

Amici are filing this brief with the consent of all parties. Counsel for Petitioner filed with the Court a blanket consent to all *amicus* briefs on July 11, 2007. A letter of consent from counsel for Respondent has been lodged with the Court.

STATEMENT OF THE CASE

Petitioner Jose Ernesto Medellin stands convicted of the particularly gruesome rape and murder of two teenage girls in Houston, Texas 14 years ago. The victims, 14-year-old Jennifer Lee Ertman and 16-year-old Elizabeth Pena, were friends and classmates at Waltrip High School in Houston. They had the misfortune of running into Medellin and fellow gang members, whom they did not know, while walking home on the evening of June 24, 1993. The gang members brutally raped both girls vaginally, anally, and orally for more than an hour. Medellin and the other gang members then took the girls to a wooded area to be killed so that they could not report the attacks. Medellin personally strangled at least one of the girls,

and perhaps both, with their own shoe laces. He later complained that he had difficulty in getting Jenny Ertman to die and had to step on her throat to finish the murder. The girls' badly decomposed bodies were discovered four days later after a call from a brother of one of the gang members led them to the site.

Overwhelming evidence of Medellin's guilt was presented at his September 1994 trial. In addition to forensic evidence, the evidence included the testimony of several witnesses to whom Medellin had bragged of his exploits immediately after the crime – including boastful statements that both of the girls were virgins until Medellin and other gang members had raped them. The evidence also included inculpatory statements given to police by various gang members (following waiver of *Miranda* rights), including a written statement by Medellin in which he admitted raping Elizabeth Pena but denied direct participation in the murders. On September 16, 1994, Medellin was convicted of murder during the course of a sexual assault. Following the punishment phase of Medellin's trial, during which the jury heard about Medellin's extensive gang-related illegal activity (including a 1992 gang-related fight that led to his expulsion from school), he was sentenced to death on October 11, 1994.

Although Medellin has lived in the United States since he was three years old and speaks English fluently, he was born in Mexico and is a citizen of that country. But despite the claim in Petitioner's brief that law enforcement personnel knew that Medellin was a Mexican citizen, the evidence on that point was equivocal; the state court hearing his habeas corpus petition found that there was no testimony at his trial that he was not a U.S. citizen or that he told anyone that he

was a Mexican national. *Medellin I* Pet. App. 47a.[3] Article 36(1) of the Vienna Convention on Consular Rights[4] provides that when an individual is arrested outside of his nation of citizenship, the nation undertaking the arrest shall, among other things, "without delay" inform the person detained of his right to communicate with consular officers from his native country. Although police officers read Medellin his *Miranda* rights following his arrest (and he explicitly waived his right to remain silent), it is uncontested that he was not informed of his Vienna Convention right to communicate with Mexican consular officials.

Medellin's counsel did not raise the Vienna Convention issue at trial, although he was fully aware that law enforcement officials had not complied with their obligations under the treaty.[5] Nor did he do so in connection with Medellin's direct appeal of his conviction and sentence. Medellin did not raise the issue until he filed an application for a writ of habeas corpus with the trial court nearly *four years* after his conviction.

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[3] Materials included in the appendix to the certiorari petition filed in No. 04-5928 are referenced herein as "*Medellin I* Pet. App ," along with a citation to the page number in that appendix.

[4] 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"). Article 36 of the Vienna Convention is reprinted at *Medellin I* Pet. App. 137a-138a.

[5] Had counsel done so, the trial judge would, of course, have been in a position to take any corrective action he deemed necessary to ensure a fair trial. For example, if he determined that police failed to inform Medellin of his consular rights despite knowledge of his Mexican citizenship, he could have considered a request to exclude Medellin's written statement to police or to delay the trial until Mexico had been given an opportunity to provide whatever legal assistance it might have chosen to give the defense.

The Texas Court of Criminal Appeals affirmed Medellin's conviction and sentence in March 1997. *Medellin I* Pet. App. 1a-31a. He did not seek review of that decision in this Court. In January 2001, the trial court recommended that Medellin's habeas corpus petition be denied. *Id.* 34a-58a. The trial court rejected claims that Medellin had not received effective assistance of counsel at trial and on direct appeal. *Id.* It further found that Medellin had waived his right to object to his conviction based on any violations of the Vienna Convention because he did not raise that objection either during or before trial. *Id.* 46a-48a. It further found that reversal of the conviction or sentence based on a Vienna Convention violation was unwarranted in the absence of any showing that Medellin had been prejudiced by the violation. *Id.* 48a. Based on the trial court's findings and conclusions, the Texas Court of Criminal Appeals denied Medellin's habeas corpus petition in October 2001. *Id.* 33a-34a.

Medellin thereafter filed a habeas corpus petition in federal district court in Houston. The district court denied that petition in June 2003. *Id.* 59a-118a. The court denied Medellin's ineffective assistance of trial counsel claim on the merits. *Id.* The court rejected Medellin's Vienna Convention claim, both on the merits and because consideration of the claim was barred by Texas's contemporary objection rule. *Id.* 79a-85a. Citing this Court's decision in *Breard v. Greene,* 523 U.S. 371 (1998), the district court held, "Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule." *Id.* 82a.

While Medellin's appeal to the Fifth Circuit was pending, the ICJ issued its decision in *Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. No. 128 (Mar. 31, 2004). Pet. App. 86a-186a. *Avena* was a proceeding initiated by

Mexico against the United States, in which Mexico complained that American police routinely fail to advise Mexican nationals arrested in the United States of their right to communicate with Mexican consular officials. Although neither Medellin nor Texas was a party to that proceeding, the complaint alleged that Medellin and 51 other individuals sentenced to death by American courts had not been afforded their rights under the Vienna Convention.

The *Avena* decision contains no indication that the ICJ had before it any specific information regarding Medellin's case. The decision indicates that Mexico submitted to the ICJ declarations from "a number" of the 52 Mexican nationals, attesting that they had never been informed of their Vienna Convention rights, but it does not indicate whether Medellin was one of those who provided an affidavit. *Avena*, ¶ 76. The decision further indicates that Medellin's was not one of the cases in which the United States submitted evidence contesting Mexico's allegation that the defendants were not provided timely notification of their Vienna Convention rights. *Id.* ¶¶ 74-90. Based on that evidence, the ICJ concluded that the United States had violated the Vienna Convention rights of Medellin and 50 of the 51 other Mexican nationals. *Id.* ¶ 90. The ICJ ruled that an appropriate remedy for those violations consisted of an obligation of the United States to "permit review and reconsideration of these nationals' cases by the United States courts" to determine whether any of the violations "caused actual prejudice to the defendant in the process of administration of criminal justice." *Id.* ¶ 121. The ICJ further ruled that this "review and reconsideration" obligation should be carried out without regard to any "procedural default" rule whereby the defendant could be deemed to have waived his right to raise Vienna Convention issues by failing to raise them in state court. *Id.* ¶¶ 111-113, 133-143.

The parties brought the *Avena* decision to the attention of the Fifth Circuit. The Fifth Circuit nonetheless denied Medellin's request for a certificate of appealability (COA) from the district court's denial of the habeas corpus petition. *Medellin I* Pet. App. 119a-135a. In denying a COA on Medellin's Vienna Convention claim, the Fifth Circuit held both that the claim was procedurally defaulted and that the Vienna Convention does not confer an individually enforceable right. *Id.* at 131a-133a. The court recognized that *Avena*'s ruling on procedural defaults contradicted *Breard*, but held that *Breard* "directly control[led]" and that it was bound to follow *Breard*. *Id.* at 132a.

On February 28, 2005, after this Court had granted a petition to review the Fifth Circuit's decision, President George W. Bush issued a written determination regarding the *Avena* decision. The determination stated, "[T]he United States will discharge its obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Pet. App. 187a. The determination did not specify what steps by a State court would constitute "giv[ing] effect" to *Avena*. This Court subsequently dismissed the writ of *certiorari* as improvidently granted, "[i]n light of the possibility that the Texas courts [would] provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum." *Medellin v. Dretke*, 544 U.S. 660, 666 (2005).

On November 15, 2006, the Texas Court of Criminal Appeals voted unanimously to dismiss Medellin's "subsequent" habeas corpus petition (*i.e.*, the second such petition filed in state court). Pet. App. 1a-79a. The court ruled that Article 11.071, § 5(a) of the Texas Code of Criminal

Procedure barred Medellin's subsequent petition because he failed to demonstrate that the claims raised therein could not have been presented in the initial petition "because the factual or legal basis for the claim" was unavailable on the date of the initial petition. Pet. App. 56a-64a.

The court also held that neither *Avena* nor the Presidential determination required the court, notwithstanding § 5(a), to consider Medellin's claims. The appeals court judges unanimously agreed that *Avena* did not require the court to "set aside Section 5 and review and reconsider [Medellin's] Vienna Convention claim," citing this Court's 2006 ruling in *Sanchez-Llamas* that "claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." Pet. App. 24a, 21 (quoting *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006)). While the judges also unanimously ruled that the Presidential determination did not require abrogation of § 5(a), none of the ruling's rationales, set forth in the various concurring opinions, garnered majority support. In her concurring opinion, Judge Keller articulated a rationale grounded in federalism. Pet. App. 64a-71a. She termed the President's action "unprecedented" and "unnecessary" (because "the adversary system offers the foreign national the opportunity to raise a Vienna Convention claim before and during trial") and stated:

> [A] president cannot use his foreign affairs authority to intrude into the state arena with impunity: at some point, the national interest is served in too attenuated a manner by the specific presidential action, and the state interest intruded upon is too fundamental, to permit a president's intervention. Such a case is now before us. . . . [The Presidential determination] attempts to *force* the states to conduct proceedings they would not otherwise conduct

and to do so in a manner inconsistent with their own procedures.

Id. 69a-70a (emphasis in original).

SUMMARY OF ARGUMENT

Although the federal government has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, this Court has recognized that the Constitution "'leaves to the several States a residuary and inviolable sovereignty.'" *New York v. United States*, 505 U.S. 144, 188 (1992) (quoting *The Federalist No. 39*, p. 245 (J. Madison) (C. Rossiter ed. 1961). One such area of inviolable sovereignty is the administration of state courts. In attempting to force the Texas courts, in violation of long-established Texas judicial rules of procedure, to hear Medellin's procedurally defaulted Vienna Convention claims, President Bush is impinging on Texas sovereignty in an unprecedented and constitutionally impermissible manner.

When deciding constitutional issues of this nature, the Court generally has sought guidance from three principal sources: (1) the Nation's historical understanding and practice; (2) the structure of the Constitution; and (3) the Court's case law. *Printz v. United States*, 521 U.S. 898, 905 (1997). All three factors indicate that the Constitution does not permit the federal government to commandeer the resources of state courts in the manner contemplated by the President's determination.

First, the President's actions are unprecedented. Medellin and his supporting *amici* have not pointed to a single prior instance in which the federal government forced state courts to assert jurisdiction over a category of claims in

violation of long-established and uniformly applied state procedural rules. The rule that the federal government is seeking to abrogate here – the contemporaneous objection rule – is particularly venerable and has been recognized by this Court as serving important functions in the administration of justice.

State courts of general jurisdiction are, of course, required to follow federal law, where applicable, in cases and controversies that come before them.[6] But as this Court has made clear, that requirement is simply a reflection of the understanding that our Nation has but one system of laws, composed of federal law, general law, and the laws of the 50 States. Thus, the requirement that state courts follow federal law is no more an intrusion on State sovereignty than is the requirement that they afford full faith and credit to the laws and judicial decrees of their sister States. But it is an altogether different matter for the federal government to seek to re-write the jurisdictional and procedural rules of state courts for the purpose of requiring those courts to hear claims barred under uniformly applied state-court rules. Such an effort is unprecedented in historic understanding and practice.

Second, the structure of the Constitution indicates that the Framers did not intend to permit the federal government to control the internal workings of state courts. In particular, Article III strictly limits the power of this Court to review state court decisions; while the Court has jurisdiction to review decisions raising federal law issues, its jurisdiction does not extend to reviewing decisions based on state law. Moreover, the structure of the Constitution reflects the Framers'

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[6] Moreover, to the extent that federal law applicable to a case pending in state court conflicts with state law, the Supremacy Clause, U.S. Const., art. VI, cl. 2, mandates that federal law should prevail.

understanding that the federal government was empowered to regulate individuals, not States.

Third, this Court's case law demonstrates a commitment to preserving the sovereign interests of state courts. While the Court regularly corrects what it deems erroneous interpretations of federal law by state courts, it has never asserted any supervisory authority over the manner in which those courts conduct their business. Nor has it asserted that the Constitution requires state courts to create additional layers of review to permit civil and criminal litigants to press federal claims that they failed to raise in initial proceedings. Moreover, the Court has disclaimed authority to overrule state court invocation of fair, uniformly applied procedural rules that result in a federal claim not being heard on its merits.

In light of the above, President Bush exceeded his constitutional authority when he directed the Texas courts to rehear Medellin's Vienna Convention claims and, while doing so, to follow a series of procedural rules dictated by the President. Medellin and his competent trial counsel were provided a reasonable opportunity to raise the Vienna Convention claims at or before trial, but they failed to do so. Under long established Texas procedural rules, that failure barred the Texas courts from considering those claims in connection with either his first or his second habeas corpus proceedings. In applying that procedural bar, Texas is not in any way discriminating against federal rights; rather, the procedural rule applies uniformly to federal and nonfederal claims alike and, as this Court has recognized, serves important functions in the administration of justice.

Moreover, the President has an obvious alternative means of achieving the foreign policy objectives set forth in his Presidential determination: he could direct that Medellin's

claims be considered by the federal courts. While a Presidential order directing the federal courts to consider the merits of Medellin's Vienna Convention claims may present a separate set of problems,[7] those are problems that should be worked out among the three branches of the federal government. The President should not be permitted to commandeer the state courts to do his foreign policy bidding simply because of concerns that the federal courts might not be willing to do so.

The judgment below should also be affirmed on alternative grounds: the Texas courts have already fully complied with the *Avena* judgment. The Texas Court of Criminal Appeals in 2001 examined Medellin's Vienna Convention claims and determined them to be without merit – because Medellin failed to demonstrate that he was prejudiced by the failure of law enforcement officials to comply with the Vienna Convention. *Avena* requires nothing more. The fact that the Texas court's examination pre-dated *Avena* is immaterial; the record does not indicate that the ICJ had any awareness of the status of Medellin's appeals when it rendered its judgment in 2004, and its decision does not indicate any concern regarding the precise timing of the examination of the Vienna Convention claims of Medellin and the other 50 Mexicans. Its only apparent concern was that all such claims receive some type of merits-based examination. Because the Texas Court of Criminal Appeals provided such an examination, this Court ought to bring state court proceedings to an end and limit Medellin to pursuit of his pending federal court claims. Justice for the victims of Medellin's heinous crimes, and for their families, requires nothing less.

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[7] A federal court might be concerned, for example, that Congress has barred it from asserting jurisdiction over the claims.

ARGUMENT

I. THE FEDERAL GOVERNMENT MAY NOT COMMANDEER TEXAS'S COURTS AND REQUIRE THEM, IN VIOLATION OF TEXAS LAW, TO EXERCISE JURISDICTION OVER MEDELLIN'S SECOND HABEAS PETITION

Although the federal government has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, this Court has recognized that the Constitution "'leaves to the several States a residuary and inviolable sovereignty.'" *New York v. United States*, 505 U.S. at 188 (quoting *The Federalist No. 39*, at 245 (J. Madison). One such area of inviolable sovereignty is the administration of state courts. In attempting to force the Texas courts, in violation of long-established Texas judicial rules of procedure, to hear Medellin's procedurally defaulted Vienna Convention claims, President Bush is impinging on Texas sovereignty in an unprecedented and constitutionally impermissible manner.

The President asserts that impinging on the sovereignty of Texas's courts is essential to allow him to carry out important foreign policy objectives. But the strength of the federal government's interests has never been deemed a relevant factor in determining whether the Constitution permits the federal government to commandeer state government functions. *See, e.g., New York*, 505 U.S. at 178; *Printz*, 521 U.S. at 932. Moreover, the President's directive to the Texas courts overlooks an obvious alternative that would avoid all federalism issues: directing that review of Medellin's claims take place in federal court, where Medellin has yet another habeas corpus petition pending. Nothing in the *Avena* decision suggests that the ICJ expected review to take place in state court rather than federal court.

Medellin asserts repeatedly that Texas's interests are of no constitutional significance because, to the extent those interests conflict with federal government policy, the Supremacy Clause mandates that they must give way to federal law. But mere citation to the Supremacy Clause does not begin to respond to Texas's federalism argument. The Supremacy Clause provides that "the Laws of the United States" shall be "the supreme Law of the Land" and binding on all state courts so long as the laws are "made in Pursuance" of the Constitution. U.S. Const., Art. VI, cl. 2. Assuming for the sake of argument that the President's directive should be included among the "Laws of the United States," the issue before the Court is whether the federal government was acting in accord with the Constitution when it adopted that law. If not, then the federal government's claim to supremacy evaporates. *See Printz*, 521 U.S. at 924-25.[8]

There is no merit to Medellin's contention that undertaking review in the state courts somehow comports with the federalism concerns expressed in *Younger v. Harris*, 401 U.S. 37, 44 (1971). Pet. Br. 32. *Younger* bars federal courts from hearing collateral challenges to on-going criminal proceedings in state court. That decision cannot be read to suggest that federalism interests are served by *requiring* States to entertain collateral challenges to state-court criminal convictions, particularly when such challenges are procedurally barred under state law.

New York and *Printz* illustrate that the Court has not hesitated to impose limits on federal government actions when those actions threaten the inviolable sovereignty of the States.

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[8] A similar analysis applies to Medellin's claim that ICJ judgments issued pursuant to Senate-ratified treaties (such as the *Avena* judgment) constitute the supreme law of the land.

When deciding constitutional issues of this nature, the Court generally has sought guidance from three principal sources: (1) the Nation's historical understanding and practice; (2) the structure of the Constitution; and (3) the Court's case law. *Printz*, 521 U.S. at 905. All three factors indicate that the Constitution does not permit the federal government to commandeer the resources of state courts in the manner contemplated by the President's determination.

A. The Historical Practice and Understanding in This Nation Is That the Federal Government Neither Dictates the Jurisdiction of State Courts nor Interferes with Uniformly Applied State Procedural Rules That May Prevent Some Litigants from Asserting Federal Claims

The unprecedented nature of the President's directive calls into serious question the constitutional propriety of his action. Medellin and his supporting *amici* have not pointed to a single prior instance in which the federal government forced state courts to assert jurisdiction over a category of claims in violation of long-established and uniformly applied state procedural rules.

Sanchez-Llamas v. Oregon, 126 U.S. 2669 (2006), rejected the ICJ's conclusion (articulated in both *Avena* and *The LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27, 2001)) that the Vienna Convention should be interpreted to preclude application of state-law procedural default rules to Article 36 claims. In so holding, the Court stressed the venerable nature of procedural default rules and the important role they have played throughout American history in our adversarial system of justice. The Court explained that that system:

> [R]elies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate the law's important interest in the finality of judgments. The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. As a result, rules such as procedural default routinely deny "legal significance" – in the *Avena* and *LaGrand* sense – to otherwise viable legal claims.

Sanchez-Llamas, 126 S. Ct. at 2685-86. The Court concluded that allowing litigants seeking to raise Vienna Convention claims to avoid application of procedural default rules would be "inconsistent with the basic framework of an adversary system" and would undermine "any number of other" state-court procedural rules, including statutes of limitation. *Id.* at 2686.

Printz included an extended discussion of scattered instances in early American history in which Congress assigned responsibility to state courts to administer federal statutes. *Printz*, 521 U.S. at 905-08.[9] The Court concluded

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[9] For example, "the first Congress required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155." *Id.* at 905-06. The Court noted, however, that these might well not have been instances in which the federal government directed state courts to expand their jurisdiction because the statutory requirements may have applied "only in States that authorized their

(continued...)

that the record was unclear regarding whether the early federal government was ever deemed entitled to force state courts to administer federal laws without their consent. *See, e.g., id.* at 806 (citing *United States v. Jones*, 109 U.S. 513, 519-20 (1883), for the proposition that obligations to enforce naturalization laws were imposed "with the consent of the States" and "could not be enforced against the consent of the State."). Because early federal trial courts did not possess federal question jurisdiction, the great bulk of lawsuits raising federal questions were filed in state courts. But that evidence is unexceptionable; each of the States maintained courts of general jurisdiction which would have had no reason to resist jurisdiction over cases raising questions of federal law.

While there is little or no evidence that state courts were ever required by the federal government to exercise jurisdiction over cases not otherwise within their jurisdiction, or to abrogate uniformly applied state procedural rules, that is not to say that state courts have ever been free to ignore federal law or federal causes of action. To the contrary, this Court has declared repeatedly that state courts are never free to ignore federal law. *See, e.g., Testa v. Katt*, 330 U.S. 386 (1947). That rule is dictated by the Supremacy Clause, which provides that "the Judges in every State shall be bound [by federal law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[10] But that truism is a

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[9](...continued)
courts to conduct naturalization proceedings." *Id.* at 906.

[10] The Court has explained this requirement as simply a reflection of the understanding that our Nation has but one system of laws, composed of federal law, general law, and the laws of the 50 States. As stated in *Howlett v. Rose*:

(continued...)

wholly distinct question from whether the federal government may commandeer state courts to do their bidding; the historical understanding and practice provides no support for the latter practice.

This Court has repeatedly disclaimed any federal power to order the expansion of state court jurisdiction or to interfere with uniformly applied state court procedural rules. *See Howlett,* 496 U.S. at 372 ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds

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[10](...continued)

Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with coordinate responsibility to enforce that law *according to their regular modes of procedure*. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876).

Howlett v. Rose, 496 U.S. 356, 367 (1990). *See also The Federalist No. 82* p. 345 (A. Hamilton). The understanding that the Nation has but one system of laws also animates the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, which requires each State to give full faith and credit to the public acts and judicial proceedings of any other State.

them.'") (quoting Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981); *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56 (1912).

The Court has prohibited States from adopting non-uniform jurisdictional requirements that discriminate against federal causes of action. Thus, *Howlett* prohibited Florida from eliminating state-court jurisdiction over federal constitutional claims against state entities while simultaneously maintaining jurisdiction over state-law suits against those same entities. *Howlett*, 496 U.S. at 379-80. *Testa* held that Rhode Island courts could not refuse to exercise jurisdiction over an action raising claims under a federal price control law, when "the Rhode Island courts ha[d] jurisdiction adequate and appropriate under established local law to adjudicate th[e] action." *Testa*, 330 U.S. at 393. Similarly, *Mondou* held that Connecticut state courts could not refuse to exercise jurisdiction over actions brought under the Federal Employers Liability Act "when their jurisdiction, as prescribed by local law is adequate to the occasion." *Mondou*, 223 U.S. at 59. But case law prohibiting discrimination against federal causes of action is of no relevance here. The Texas contemporaneous objection rule does not discriminate against federal rights; rather, in general it bars consideration of *any* legal claim, whether based on federal or state law, not raised in a timely manner.

In sum, the general understanding and practice throughout American history has been that the federal government neither dictates the jurisdiction of state courts nor interferes with uniformly applied state procedural rules – even when application of those rules prevent a litigant from asserting a federal claim.

B. The Constitution Establishes a System of Dual Sovereignty Inconsistent with Federal Control Over the Jurisdiction and Procedures of State Courts

The structure of the Constitution indicates that the Framers did not intend to permit the federal government to control the internal workings of state courts.

It is incontestable that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The States' retention of an "inviolable sovereignty" is:

> [R]eflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the Amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guaranty Clause, Art. IV, § 4, which presupposes the continued existence of the states and those means and instrumentalities which are the creation of their sovereign and reserved rights.

Printz, 521 U.S. at 919 (internal quotations omitted).

More importantly for the issue at hand, the Constitution reflects the Framers' understanding that the federal government would operate most effectively if it imposed its regulations on citizens directly, rather than indirectly through the instrumentalities of state governments. "The Framers' experience under the Articles of Confederation had persuaded them that using the States as instruments of federal governance

was both ineffectual and provocative of federal-state conflict." *Id.* Thus, as explained in *New York*:

> In providing a stronger central government, . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . . . [T]he Court has consistently respected that choice.

New York, 505 U.S. at 166. Accordingly, the structure of the Constitution suggests that the Framers did not intend to permit the federal government to commandeer state courts for the purpose of achieving policies to its liking. Rather, they most likely intended that the federal government would seek to achieve its policy objectives using its own instrumentalities – in this instance, the federal courts.

The Framers' desire to limit the federal government's direct control over state courts is also reflected in Article III's limitation on federal judicial power. Art. III, § 2 extends federal judicial power to cases arising under the Constitution or laws of the United States, but does not – except in limited circumstances – grant federal court jurisdiction over cases raising purely state law issues. That provision has been interpreted since the 1820s as granting the Court jurisdiction to review state court decisions raising federal law issues but not state court decisions based on state law. *Cohens v. Virginia*, 19 U.S. 264, 422 (1821). The Court thereafter has consistently disclaimed the power to second-guess state courts' interpretations of state law, holding that "a State's highest court is the final judicial arbiter of the meaning of state statutes." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

C. Case Law Supports the Historical Understanding That Federal Government Commandeering of State Courts Is Inconsistent with the System of Dual Sovereignty

This Court's case law demonstrates a commitment to preserving the sovereign interests of state courts. While the Court regularly corrects what it deems erroneous interpretations of federal law by state courts, it has never asserted any supervisory authority over the manner in which those courts conduct their business. *See, e.g., Sanchez-Llamas*, 126 S. Ct. at 2679 ("'Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.'") (quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982).[11] Any federal government effort to re-write uniformly applied state court procedural rules is inconsistent with the Court's disclaimer of supervisory authority.

The Court has held that the Constitution does not compel Texas to provide convicted criminals with *any* access to the state courts for the purpose of seeking habeas corpus relief. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). Nonetheless, Texas provides greater opportunities for post-conviction relief than is constitutionally required – it permits convicted criminals to seek post-conviction relief with respect to claims that: (1) have not been waived under the contemporaneous objection rule based on a failure to raise them at or before trial; and (2) are not barred by Article 11.071, § 5(a)'s limitations on claims raised in a subsequent

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[11] Indeed, the Constitution imposes limitations on the powers of all branches of the federal government to supervise state courts. For example, Congress is not permitted to dictate retirement policies for state judges. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

habeas corpus petition. It is difficult to imagine that the United States would be asking that the Texas Court of Criminal Appeals be *compelled* to consider Medellin's habeas petition if Texas law made no provision whatsoever for the filing of such petitions. Accordingly, it makes no sense to suggest that Texas – simply because it has left the door slightly ajar by permitting habeas petitions to be filed in a limited number of cases – can be compelled to open the door all the way and to allow Medellin to raise claims that are procedurally barred under longstanding, uniformly applied state procedural rules. Medellin has cited no cases that so hold.

Moreover, numerous decisions have established that this Court will not overturn a state court judgment decided on the basis of a uniformly applied procedural rule, even when the result of invoking the rule is that a litigant is denied an opportunity to assert a federal claim.[12] *See, e.g., Spies v. Illinois*, 123 U.S. 131, 180-81 (1887) (murder defendant's due process claim not subject to review in Supreme Court because defendant had failed to raise that claim in the trial court); *Brown v. Massachusetts*, 144 U.S. 573, 579-580 (1892); *Jacobi v. Alabama*, 187 U.S. 133, 135 (1902); *Harding v. Illinois*, 196 U.S. 78, 86 (1904); *Chesapeake and Ohio Ry. Co. v. McDonald*, 214 U.S. 191, 193-94 (1909); *John v. Paullin*, 231 U.S. 583, 178-79 (1913) ("Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and state law and

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[12] *Amici* located no such decisions pre-dating adoption of the Fourteenth Amendment. The paucity of such decisions may well reflect that, prior to adoption of the Fourteenth Amendment, there were very few opportunities for those charged with crimes in state court to interpose a defense based on federal law.

practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.").

Each of the preceding cases reached the Court on writ of error. The Court's authority to grant such writs was limited somewhat by § 709 of the Revised Statutes of the U.S., which required a party seeking a writ of error in a state court case to demonstrate, *inter alia*, that the federal issue at stake had been explicitly brought to the attention of the state court. *See, e.g., Chesapeake & Ohio*, 214 U.S. at 192. Accordingly, although the Court's case law from the late 19th and early 20th centuries demonstrates an unwillingness to second-guess state court invocation of procedural rules to block consideration of federal claims, that unwillingness may have been based at least in part on statutory constraints.

However, even after the lifting of those statutory constraints in 1925, the Court has continued to rule that it is without power to overturn a state court decision issued on the basis of a uniformly applied procedural default rule, even when the decision prevents a federal claim from being heard. Those rulings indicate that the Court deems itself constitutionally prohibited from overturning such state court decisions, so long as the affected party had a fair opportunity to raise his or her federal claim in state court. In *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925), the Court explained, "But there is nothing in these case which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, *if the practice gives the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court*" (emphasis

added). Similarly, in *Herb v. Pitcairne*, 324 U.S. 117, 125 (1945), the Court held, "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *See also Michel v. Louisiana*, 350 U.S. 91, 99 (1955) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.").

In sum, nothing in the case law provides any support for the notion that federal officials are free to commandeer the state courts when they deem it necessary to serve their foreign policy interests. To the contrary, the Court has repeatedly expressed its unwillingness to interfere with state courts' application of their uniformly applied procedural rules – rules that often prevent litigants from raising federal issue.

D. The Federal Government Exceeds Its Powers in Ordering Texas Courts to Hear a Case That Could More Easily Be Heard in Federal Court

In light of the foregoing, President Bush exceeded his constitutional authority when he directed the Texas courts to rehear Medellin's Vienna Convention claims. His directive was particularly obtrusive in that it directed Texas to give effect to the *Avena* decision "in accordance with principles of comity." Pet. App. 187a.[13] This wholesale commandeering of

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[13] In its 2005 brief in *Medellin I*, the federal government explained that the command that *Avena* be given effect "in accordance with principles of comity" was intend to restrict Texas's options considerably. The President was directing Texas courts not only not to apply any sort of procedural default rule, but also not to "reexamine

(continued...)

the Texas courts for the purpose of serving the federal government's foreign policy objectives cannot be squared with the federalism principles described above.

There is no reasonable dispute that Medellin and his competent trial counsel (who was well aware of the Vienna Convention issue) had ample opportunity to raise the issue at or before trial. Had they done so and demonstrated prejudice, the trial court would have been in a position to delay the trial long enough to give Mexico an opportunity to provide whatever legal assistance it might have chosen to give the defense. They trial court could also have considered a motion to exclude Medellin's written statement to police (*but see Sanchez-Llamas*); had that statement been excluded, the jury could have determined Medellin's fate based solely on the remaining, overwhelming evidence of Medellin's guilt (including the statements of other gang members and the testimony of others to whom Medellin confessed his guilt). Thus, Medellin has only himself to blame for whatever prejudice he suffered by failing to raise his Vienna Convention claims in a timely manner. Under our adversarial system of justice, Texas has compelling reasons (as outlined above and in *Sanchez-Llamas*) for invoking long-standing state procedural rules to bar Medellin from re-raising his Vienna Convention claims. In doing so, Texas is no more refusing to enforce federal law than are countless courts that regularly

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[13](...continued)
whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention." Brief for the United States as *Amicus Curiae* in No. 04-5928, at 46.

prevent criminal defendants from raising important federal constitutional rights in an untimely manner.[14]

The reason this Court is permitted to review questions of federal law decided by state courts is to ensure that the federal government does not lose the power to enforce its own laws in a uniform manner. *Cohens*, 19 U.S. at 384-85. But that is not a danger here. Texas courts are not refusing to enforce federal law or exercising their jurisdiction in a manner that discriminates against federal law. They are simply enforcing long-standing procedural rules in a manner well-recognized as serving the ends of justice. Under those circumstances, there can be no justification for the President to intrude into the Texas judicial system in this unprecedented fashion.

The President's actions are particularly unjustified given the availability of an alternative means of achieving the foreign policy objectives set forth in his Presidential determination: he could direct that Medellin's claims be considered by the federal courts. While a Presidential order directing the federal courts to consider the merits of Medellin's Vienna Convention claims may be met with skepticism by

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[14] Indeed, both Medellin and the United States appear to recognize that the courts are within their rights in applying at least some of their procedural rules in a manner that could cut off Medellin's assertion of his Vienna Convention claim. Medellin conceded that he filed his subsequent habeas petition when he did (*i.e.*, while the first Supreme Court case was still pending) because he feared that failure to do so would create a danger that his claims would be barred under Texas's statute of limitations. Pet. Br. 11. He further conceded that he filed his pending federal habeas petition based on similar fears. *Id.* 15 n.7. Both Medellin and the United States concede that merits consideration in the federal courts of his Vienna Convention claims might be barred by congressionally mandated restrictions on access to federal habeas corpus. *Id.* 32; U.S. Br. 4.

those courts, those are problems that should be worked out among the three branches of the federal government. The President should not be permitted to commandeer the state courts to do his foreign policy bidding simply because of concerns that the federal courts might not be willing to do so.

If the federal government ultimately determines that Medellin – the confessed murderer of two teenage girls – is being held by Texas authorities in violation of federal law, it is entitled to order his release. But if it does so, it should be made to bear responsibility for what undoubtedly would be a politically unpopular decision, and not be permitted to escape responsibility by foisting the decision-making process onto the Texas judiciary. As this Court has explained, requiring government officials to take responsibilities for their own actions is one of the principal virtues of our system of dual sovereignty. *New York*, 505 U.S. at 168-69.

Medellin has already made clear by his actions that, regardless how the Texas courts ultimately rule on his claims, he intends to take those claims back into the federal court system. Accordingly, it serves no interest of the President to require, in violation of long-standing state procedural rules and our cherished ideals of federalism, that those claims first be heard on the merits in the courts of Texas.

II. TEXAS COURTS HAVE ADEQUATELY CONSIDERED MEDELLIN'S CLAIM THAT HE WAS PREJUDICED BY THE VIENNA CONVENTION VIOLATION

The judgment below should also be affirmed on alternative grounds: the Texas courts have already fully complied with the *Avena* judgment. The Texas Court of Criminal Appeals in 2001 examined Medellin's Vienna

Convention claims and determined them to be without merit – because Medellin failed to demonstrate that he was prejudiced by the failure of law enforcement officials to comply with the Vienna Convention. *Avena* requires nothing more.

The fact that the Texas court's examination pre-dated *Avena* is immaterial; the record does not indicate that the ICJ had any awareness of the status of Medellin's appeals when it rendered its judgment in 2004, and its decision does not indicate any concern regarding the precise timing of the examination of the Vienna Convention claims of Medellin and the other 50 Mexicans. Nor did the ICJ specify what, if any, relief should be afforded to those individuals. Its only apparent concern was that all such claims receive some type of merits-based examination. Because the Texas Court of Criminal Appeals provided such an examination, this Court ought to bring state court proceedings to an end and limit Medellin to pursuit of his pending federal court claims. Justice for the victims of Medellin's heinous crimes, and for their families, requires nothing less.

CONCLUSION

Amici curiae WLF, Randy and Sandra Ertman, and the Allied Educational Foundation, respectfully request that the Court affirm the decision below.

Respectfully submitted,

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Dated: August 23, 2007

Counsel wish to thank Joseph Baker and Gabriel Brake, students at Texas Tech University School of Law, for their assistance in preparing this brief.

IN THE SUPREME COURT OF THE UNITED STATES

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JOSE ERNESTO MEDELLIN, :

Petitioner :

v. : No. 06-984

TEXAS. :

- x

Washington, D.C.

Wednesday, October 10, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

DONALD F. DONOVAN, ESQ., New York, N.Y.; on behalf of the Petitioner.

GEN. PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

R. TED CRUZ, ESQ., Solicitor General, Austin, Tex.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 06-984, Medellin v. Texas.

Mr. Donovan.

ORAL ARGUMENT OF DONALD F. DONOVAN

ON BEHALF OF THE PETITIONER

MR. DONOVAN: Mr. Chief Justice, and may it please the Court:

The President and the Senate entered into three treaties, the Optional Protocol, the UN Charter, and the ICJ Statute, by which the United States agreed that it would comply with the ICJ's decision in any case to which it was a party. We now have such a decision, and the President of the United States has determined that the United States should comply.

Texas, however, tells this Court that it should tell the world that the framers left us a Constitution in which neither this Court nor the President nor maybe even Congress could ensure that the United States kept the promise that its elected representatives made to its treaty partners. Texas's position is directly contrary to the constitutional design.

JUSTICE SCALIA: That's not such an

outrageous proposition. You'd certainly acknowledge that the President and the Senate could not enter into a treaty that required the States to do something that was unconstitutional.

MR. DONOVAN: Yes. The Constitution --

JUSTICE SCALIA: So there would be the situation that presents the shocking situation you've just described. There is a treaty, but nonetheless it cannot be enforced domestically.

MR. DONOVAN: There would be constitutional -- there might be affirmative constitutional constraints on the enforcement of a treaty, but there are none here.

CHIEF JUSTICE ROBERTS: Who would enforce those constraints? The thing that concerns me about your position is that it seems to leave no role for this Court in interpreting treaties as a matter of Federal law.

Suppose, for example, that the International Court of Justice determined in this case its judgment was the same, but they added: As a matter of deterrence, we think the officers who failed to give consular warning should each be sentenced to 5 years in jail. That's the ICJ determination. Would this Court have a role in reviewing that judgment?

MR. DONOVAN: This Court would have a role

in reviewing that judgment, and here's -- here's the question. This Court has an obligation, has the authority, to say what the law is. In this case the obligation is, in fact, to comply with the judgment, itself.

CHIEF JUSTICE ROBERTS: Even if we determine --

MR. DONOVAN: And if that obligation --

CHIEF JUSTICE ROBERTS: Even if we determine, even if we determine that that judgment is based on a legal error?

MR. DONOVAN: The question -- that's the basis of submitting a dispute to a third-party dispute-resolution mechanism, yes.

CHIEF JUSTICE ROBERTS: So if the ICJ determined that the officers should each go to jail for 5 years, we would have no basis for reviewing that judgment?

MR. DONOVAN: Wel, that would be -- well, that would be a -- raise a separate obstacle. If I may answer the questions in turn, first --

JUSTICE GINSBURG: Does the ICJ ever issue a judgment of that character? It issues a judgment between two nations, two or more nations, and it is instructs the United States to do something. I'm not

aware of any -- any decision of the ICJ that says what a sentence should be for a particular individual.

MR. DONOVAN: That is correct. The ICJ decides disputes between nations, but those disputes may involve the nations' obligation as to specific individuals. In this case --

JUSTICE KENNEDY: Well, I'm still interested in the answer to the Chief Justice's hypothetical.

MR. DONOVAN: Well, as I say, there are two --

JUSTICE KENNEDY: Suppose the court acts beyond, clearly beyond, its jurisdiction?

MR. DONOVAN: Well, it's -- with respect, there's no suggestion here that the court has acted beyond its jurisdiction. Indeed, the President has determined otherwise.

JUSTICE KENNEDY: Could you answer the hypothetical, please.

MR. DONOVAN: But if the court, itself -- if the ICJ, itself, made a determination as to a dispute that is within its jurisdiction and that imposes an obligation that is within this Court's provenance to enforce, that is, that it determines the rights attributable -- enforceable within a court of justice, this Court would be enforcing the obligation to comply.

It wouldn't -- the fact that it diverged from the court's own interpretation, for example, here in Sanchez-Llamas, is not relevant to the treaty obligation that this Court is exercising --

CHIEF JUSTICE ROBERTS: I'm sorry. I'm still looking for an answer to the hypothetical. What would be the basis for this Court's reviewing the ICJ's determination that officers should go to jail for 5 years?

MR. DONOVAN: Because in that situation that may be beyond the Court's -- the executive power of the Court. What the Court would be doing is determining the rights attributable to --

CHIEF JUSTICE ROBERTS: The Court doesn't have executive power. It has judicial power. It's already exercised that judicial power in Sanchez-Llamas in determing the meaning of this treaty.

And I understood your position to be that we have no authority to construe the treaty in this case because a judgment was issued by the International Court of Justice.

MR. DONOVAN: The -- the question here is that the --the Court would be exercising its judicial authority to construe the United States's obligation to comply with the judgment. The nature of that

obligation, itself, could be one that would be enforceable, in this Court's words, "in a court of justice;" and that's the nature of this obligation. Mr. Medellin gets a review and reconsideration.

In the Chief Justice's hypothetical, that may well be an obligation that would be enforceable by other actors that would -- which would not be directly enforceable in a court as here.

JUSTICE BREYER: I thought --

MR. DONOVAN: It depends on the nature of --

JUSTICE BREYER: I thought the question -- and I apologize if I'm not paraphrasing it because I have my own. This has arisen frequently. Brussels has a treaty, and that treaty binds all the member nations, and supreme courts of various nations have come up against this problem:

What would happen if the Brussels court or the EU court insists under the treaty that we do something that violates our own Constitution? I think this is an example of that. And the answer typically has been: Well, we'd follow our own Constitution, at least if it was a violation, what the EU said, of fundamental human rights or destroyed some basic structural part of our Constitution.

And the question that I would have is,

doesn't that kind of approach -- not exactly but that kind of approach -- satisfy whatever problem there is in this respect here?

MR. DONOVAN: If there were -- if an ICJ --

JUSTICE BREYER: If the ICJ were to do something which it had never done, like, say, put everybody in jail for 50 years -- I don't know that there is such a thing -- but suppose they did, if they did, I guess that might violate something basic in our Constitution, in which case we wouldn't enforce it.

MR. DONOVAN: That's right and --

JUSTICE BREYER: If we took that approach --

CHIEF JUSTICE ROBERTS: Now --

MR. DONOVAN: If there --

CHIEF JUSTICE ROBERTS: Just to get back, you're conceding, I take it, whether the ICJ has done something like this before or not -- and we can debate whether what they've done in this case is precisely that -- there is a role for this Court in determining whether or not a judgment of the ICJ should be enforced.

MR. DONOVAN: There is surely because it's this Court that would be enforcing the obligation to comply. And just as a treaty cannot contravene an --

CHIEF JUSTICE ROBERTS: Just enforcing the obligation to comply or, as we have in this case,

determining the legal basis for the ICJ determination?

MR. DONOVAN: There are -- there are two different obligations here: There is an obligation under the Vienna Convention itself, and this Court has determined the dispositive effect of that obligation of a matter of U.S. law. But there's a different obligation. The President and the Senate agree to go to a third party, to go to the International Court of Justice, to resolve disputes. The very premise of that obligation is that we might disagree with the determination -- with the interpretation of the treaty, and we agreed in that circumstance to comply with the --

JUSTICE KENNEDY: Suppose in this case the President did the opposite -- the same facts only the President said to Texas, do not comply with this judgment.

MR. DONOVAN: Well, it -- that would -- it would be inconsistent with this Court's duty and obligation to comply, to enforce a treaty that the -- that the --

JUSTICE KENNEDY: So then the President's --

MR. DONOVAN: If the --

JUSTICE KENNEDY: -- determination is not conclusive.

MR. DONOVAN: Well, the President's

determination -- what the President has determined here is to enforce the treaty. He --

JUSTICE KENNEDY: My hypothetical is he's coming out the other way. He says don't follow this judgment. And you say he can't do that.

MR. DONOVAN: If --

JUSTICE KENNEDY: And I -- I think that that's not -- not consistent with your earlier position.

MR. DONOVAN: Oh, if the President here -- the -- if there's an obligation here to comply and, in the words this Court, it's "an obligation of a nature to be enforced in a court of justice," and here the obligation imposed by the ICJ and the Avena judgment is an -- is an obligation --

JUSTICE ALITO: Isn't the obligation --

MR. DONOVAN: -- which essentially --

JUSTICE ALITO: Isn't the obligation that the United States undertook when it signed the UN Charter the obligation to undertake to comply with ICJ judgments in accordance with its own constitutional processes, not necessarily that any ICJ decision would be regarded by any court in this country as binding Federal law?

MR. DONOVAN: Well, it would be -- that -- that's exactly right. What the -- what the ICJ -- what

U.S. did is undertake to comply. So the question is, what is the nature of the obligation imposed?

JUSTICE GINSBURG: If you had a --

MR. DONOVAN: It might have obligations --

JUSTICE GINSBURG: If you had a treaty on the recognition and enforcement of judgments, mutual recognition and enforcement, then we would enforce the judgment that we agreed to enforce by treaty. We wouldn't look behind it to see if we agreed with it on the merits.

Are you saying that this undertaking, this agreement to submit to the compulsory jurisdiction of the ICJ gives the judgment in the particular case, although not precedential effect, the counterpart to full faith and credit?

MR. DONOVAN: That's exactly the effect of the judgment.

JUSTICE SCALIA: It's self-enforcing. I thought you --

MR. DONOVAN: It's --

JUSTICE SCALIA: I thought you -- you think this treaty is self-enforcing. You don't really need the President's order here.

MR. DONOVAN: Well, if the -- whether or not the treaty obligation is self-executing or

self-enforcing goes to the nature of the obligation. If the ICJ said -- if a treaty or an ICJ judgment said, go pass a statute, that's obviously directed to Congress. If it said cease hostilities, that's directed to the President. But as this Court has said, when a treaty or, by extension, a treaty obligation to comply with a judgment is --

JUSTICE STEVENS: May I --

MR. DONOVAN: -- of a nature to be enforced --

JUSTICE STEVENS: May ask this question? I don't think you've answered the Chief Justice's original hypothetical. It's easy, of course; they cannot compel us to violate our Constitution by a judgment of their kind. But what about the hypothetical that they said the sentence for this man should be 5 years, not just there be an investigation to see if he's been prejudiced. Would we have to follow that judgment?

MR. DONOVAN: Well, in that situation, if it was a judgment rendered in a case to which we had --

JUSTICE STEVENS: In this very case.

MR. DONOVAN: That would be --

JUSTICE STEVENS: This very case. Supposing they had said the judgment is that Medellin should spend 5 years in jail and no more. Would we have to honor

that judgment?

MR. DONOVAN: In the first instance, yes, the Court would honor that judgment as an obligation to comply. But remember that there are --

JUSTICE GINSBURG: Then it becomes --

MR. DONOVAN: -- some constraints that --

JUSTICE GINSBURG: Then it becomes a penal judgment, and I thought the rule was that no country forces -- enforces another country's penal judgment.

MR. DONOVAN: Well, that would depend on the -- if -- how you construed the obligation to comply.

JUSTICE GINSBURG: But if we say --

MR. DONOVAN: In this case, we have --

JUSTICE GINSBURG: -- this man goes to jail for 5 years, it seems to me that's a penal judgment.

MR. DONOVAN: If that was the nature of the dispute that the United -- that is, of course, not the nature of the dispute that the United States --

JUSTICE ALITO: What if they say --

MR. DONOVAN: But if he --

JUSTICE ALITO: -- he goes to jail for no time at all? They say that the remedy for these violations, in order to deter future violations, should be that the charges should be dismissed and any future prosecution should be barred. Would that be

automatically binding?

MR. DONOVAN: Well, the question is, is it binding in the first instance because the -- there's an obligation to comply? That doesn't say anything about, for example, Congress's ability to repudiate that obligation to comply, just like it has the obligation -- the authority as a last-in-time rule, pursuant to the last-in-time rule, to repudiate any treaty obligation. But the framers wanted treaties to be enforced in the first instance when they were susceptible of judicial enforcement, and if the ICJ renders a judgment pursuant to our treaty obligation to submit disputes, that is of a nature to be judicially enforced, then the Court --

CHIEF JUSTICE ROBERTS: Is the answer to --

MR. DONOVAN: -- would be exercising --

CHIEF JUSTICE ROBERTS: Is the answer to either my or Justice Stevens's hypothetical then, yes, we do have to enforce an ICJ judgment of that sort?

MR. DONOVAN: You would enforce an ICJ judgment that did in fact -- that was of a nature to be enforced in -- in a judicial proceeding.

CHIEF JUSTICE ROBERTS: But --

JUSTICE SCALIA: This is not of a nature to be enforced in a judicial proceeding in Texas. Texas has procedural rules that disable the Texas court from

complying with the ICJ judgment here. Are you telling me that the ICJ judgment empowers either Federal or State courts to do things which -- which their laws do not permit them to do?

MR. DONOVAN: If the -- both the President's determination and the Article 94 obligation which result in the Avena judgment are Federal law. The President's determination pursuant to his State court authority and Article II authority and the -- and the Avena judgment pursuant to the treaty --

JUSTICE SCALIA: And -- and do you know of any other Federal law that -- that interferes in the -- in the procedures of State criminal courts, directs them as to what -- what procedures they have to have?

MR. DONOVAN: The Court has -- when there's a Federal procedural rule that preempts a State procedural rule, the Court allows that to preempt as a Federal rule all the time.

JUSTICE SCALIA: Really?

MR. DONOVAN: That's a function of --

JUSTICE SCALIA: Where? I don't know what you're talking about unless you're talking about constitutional requirements. Of course, those are binding on the States. But you're saying that the Federal Government can prescribe State court procedures

and authorize State courts to do things which -- which the State government does not authorize them to do?

MR. DONOVAN: The Federal Government can prescribe rules of decision that preempt Federal rules and require the cases that other -- that would not otherwise be heard to be heard. That's --

JUSTICE SOUTER: Well, you're -- you're -- as I understand it, in order for you to prevail on that point, the only -- the only conclusion that has to be drawn, as I understand it, is that the Texas courts have subject matter jurisdiction of this kind of -- of order, and that the bar that Texas is asserting is simply, in effect, a procedural bar; and, therefore, in order for this Federal rule to preempt the State bar is not to give the State courts jurisdiction they don't have, but to remove a bar to the exercise of their jurisdiction that State law, absent preemption, would impose; is that correct?

MR. DONOVAN: That's correct. That's right. It removes a bar by preempting that bar.

JUSTICE ALITO: You just --

MR. DONOVAN: If I may --

JUSTICE ALITO: You just said that the Avena decision is Federal law. How is the -- how is the Avena decision itself a Federal law?

MR. DONOVAN: Well, the Avena decision --

JUSTICE ALITO: It's not a statute. It's not the Constitution. It's not a statute. It's not itself a treaty.

MR. DONOVAN: The Avena decision has the force of Federal law, either by virture of the treaty obligation to comply with it under Article 94-1, or the President's determination under his Article II authority to require -- to determine that the United States should comply. And by either one of those vehicles, in effect the judgment becomes the --

JUSTICE GINSBURG: You didn't mention the --

MR. DONOVAN: -- the instrument by which it must be complied with.

JUSTICE GINSBURG: You didn't mention the Optional Protocol which is -- is where the United States gave its promise. It voluntarily accepted this jurisdiction. It didn't have to.

MR. DONOVAN: Well, that's right. It's the combined force of the Optional Protocol and the UN Charter and ICJ statute.

And if I may reserve the rest of my --

CHIEF JUSTICE ROBERTS: Well, why don't -- why don't you take 5 extra minutes? And we'll give you your rebuttal time.

If the Avena judgment is binding as Federal law, is it your position, though, that the -- this Court has no authority to review the content of that Federal law -- the judgment? Our choice is simply enforce it?

MR. DONOVAN: The relevant Federal law here is the Federal law that says that the United States will comply pursuant to its voluntary choice to submit these -- this --

CHIEF JUSTICE ROBERTS: So we have no --

MR. DONOVAN: I'm sorry -- to the ICJ.

CHIEF JUSTICE ROBERTS: We have no authority to review the judgment itself, even though the judgment will have the effect as Federal law of preempting the State law in this instance?

MR. DONOVAN: Well, you are in effect applying Federal law in the form of the obligation to comply. That's different than applying the Vienna Convention --

CHIEF JUSTICE ROBERTS: Excuse me, but your position is not that we are applying the obligation to comply, because we interpreted that in Sanchez-Llamas and came to the exact same conclusion as the ICG here. What you're saying is it's different here because the operative law is the judgment.

MR. DONOVAN: The operative -- it's

different because on the one hand, in Sanchez-Llamoas, this Court was interpreting the underlying obligation under the treaty. That is, the immediately applicable instrument. But, as with respect to any judgment, a court's -- and this Court has affirmed with respect to international adjudications, that it will enforce an international adjudication.

JUSTICE KENNEDY: Can this court interpret the meaning of the Avena judgment if it's ambiguous? For instance, it said that a number of Mexico nationals have not received a hearing. It didn't say all of them. And I have a problem, incidentally, because I think Medellin did receive all the hearing that he's entitled to under the judgment anyway.

Can we interpret the judgment in that respect if it's ambiguous, not clear?

MR. DONOVAN: Wel, in this case, the court would be -- a court applying the Avena judgment either by virtue of the Optional Protocol in 94-1 and the President's determination would be in effect applying Federal law. We think the judgments --

JUSTICE KENNEDY: Can we interpret the judgment?

MR. DONOVAN: Well, to the extent necessary to apply Federal law in the form of a judgment --

JUSTICE KENNEDY: And can the President displace our authority to do that?

MR. DONOVAN: The President would not displace the Court's authority to interpret a judgment, no. What the President has said is that the judgment shall be enforced. That's an independent source of Federal law under his Article II --

CHIEF JUSTICE ROBERTS: So if he determines that the judgment should not be enforced and this Court determines, based on our construction of the treaty and the judgment that it should be enforced, which determination controls?

MR. DONOVAN: This Court -- to the extent that this is Federal law, this Court has the ultimate authority to determine whether or not it should be complied with. And this Court -- the framers have made treaties supreme Federal law specification so they could be judicially enforceable.

CHIEF JUSTICE ROBERTS: Well, if we have the authority to determine whether the treaty should be complied with in the face of a presidential determination, why don't we have the independent authority to determine whether or not it should be complied with at a matter of Federal law without regard to the President's determination?

MR. DONOVAN: You have two separate and independent sources of authority here. Without the President's determination, this Court pursuant to the mandate in the Supremacy Clause would apply the treaty obligation to comply with the judgment because the nature of the judgment is such to be enforced in a court of justice. In this instance, you have an entirely independent source of authority because the President in the exercise of his Article II authority has determined that it's in the paramount interest of the United States to comply. That becomes a second object.

Of course, it would be a judicial function to interpret the -- interpret those obligations, interpret what the President meant. But in this case it's crystal clear. The Avena judgment is mandatory and prospective. The President is determined that it be enforced, and that would be the result even had the President not acted pursuant to the mandate of the Supremacy Clause, which makes treatise enforceable Federal law.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Donovan. We'll give you 5 minutes for your rebuttal.

General Clement.

ORAL ARGUMENT OF GEN. PAUL D. CLEMENT.

ON BEHALF OF THE UNITED STATES AS
AMICUS CURIAE SUPPORTING THE PETITIONER
GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:
JUSTICE SCALIA: You don't agree with the last statement.
GENERAL CLEMENT: I don't think I do agree with that and there's a couple of the issues here where we take a slightly different take. Obviously we feel the President's determination here that we will comply with the Avena judgment is a critical element in why there's an enforceable obligation --
JUSTICE SCALIA: We would have no -- according to you, we would have no obligation to enforce this judgment but for the President's action?
GENERAL CLEMENT: That's correct, Justice Scalia. Now, obviously, Mr. Donovan and his clients could get here and ask you to enforce the judgment of it own force without the President's determination and that would ultimately be a question for this Court. We of course --
JUSTICE SCALIA: We could decide to go back, too. But would we have any authority to do it?
GENERAL CLEMENT: I hope that you wouldn't and we would be up here saying don't, because if you

look at Article 94 of the UN Charter as a whole, it has two components and I think it makes clear why the President's intervening role here is important. 94-1 says that we undertake to comply with our obligations, with our obligations to comply with the judgment. But 94-2 says what happens when a country doesn't do that. It's a matter for the Security Council. And that, of course, I think necessarily implies that countries do retain the option to put themselves out of compliance with an International Court of Justice judgment.

JUSTICE GINSBURG: But that would take an action by somebody in the country.

GENERAL CLEMENT: Exactly, Justice Ginsburg, and I think that --

JUSTICE GINSBURG: Here that hasn't -- that hasn't happened. 94 would never be triggered because we haven't said we're breaking our promise, we're not going to comply.

GENERAL CLEMENT: Absolutely, and that's why we're supporting Mr. Donovan.

JUSTICE SCALIA: Wait a minute. In order to get it to the Security Council, you have to take some affirmative action not to comply? It's just not enough simply not to comply?

GENERAL CLEMENT: Whether it's an omission

or a commission I don't think is the point, Justice Scalia. My point --

JUSTICE SCALIA: I thought that was tte point of Justice Ginsburg's comment, that there had been no decision not to comply. Don't you need an affirmative decision to comply?

GENERAL CLEMENT: I didn't take that to mean --

JUSTICE GINSBURG: If you don't -- if you don't comply, you don't comply. But we -- certainly not -- in that situation here, the President said the United States agreed that it would submit to the binding jurisdiction for one case only, and we are bound by that judgment and I'm going to enforce it.

GENERAL CLEMENT: I agree, i think the omission-commission --

JUSTICE SCALIA: I know you agree, but it depends on whether it's up to the President to make that call. Usually when we have treaties that are not self-enforcing the judgment of whether that international law obligation shall be made domestic law is a judgment for the Congress.

Congress passes a law to enforce the treaty, and you're telling us that, well, we don't need the Congress; the President can make a domestic law by

writing a memo to his attorney general.

GENERAL CLEMENT: Well, Justice Scalia, let me take that in turn. Let me just first close the discussion of what happened here by saying the reason I think the commission-omission distinction doesn't have much purchase here is because the President did make a determination that we would comply. And I think if you ask the question who makes the determination as to whether we're going to default on our international law obligations or comply, especially vis-a-vis the UN, the answer to that question is quite clear: It's the President, and Congress has acquiesced in that with the UN Participation act at 22 U.S.C. 287.

CHIEF JUSTICE ROBERTS: What if the President had said, we're going to comply with this judgment, but in a different way than the ICJ determined. We're going to comply by examining in each case whether there's already been a determination of prejudice, and if there has then there's no further review, but if there hasn't then there'll be further review. Would that be binding as a matter of Federal law?

GENERAL CLEMENT: It depends exactly what form that would take. I think part of the problem -- I'm stumbling with that question --

CHIEF JUSTICE ROBERTS: It's the same as a memorandum just like -- it's a memorandum just like the one we have here.

GENERAL CLEMENT: And what does it suggest that is supposed to be done with tne end product of that determination?

CHIEF JUSTICE ROBERTS: It says that if there has already been -- the State courts are to determine if there's already been a determination of prejudice in the case, and if there has there's to be no further review. But if they determine there hasn't, there is to be further review. That's different than the ICJ's judgment, which suggests there should be a new determination in every case.

Is that -- does that have the same status as the memorandum here?

GENERAL CLEMENT: I would say that it wouldn't -- I would say that it wouldn't, as you suggest, not fully comply and not fully discharge with our obligation.

But the extent to which we did and purported to be doing that under compliance with the judgment, it would have the same force as providing the rule of decision, which, to get back to Justice Scalia's question, especially in a context like this, is not so

unprecedented. It is not materially different from when the President supplies the rule of decision in the pre-FSIA practice by making a determination, binding on the courts State and Federal, that somebody has sovereign immunity.

JUSTICE ALITO: If we agree with you, would the effect be that the President can take any treaty that is ratified on the understanding that it's not self-executing and execute the treaty and give it force under domestic law?

GENERAL CLEMENT: No, Justice Alito, I don't think the theory would sweep that broadly, and I think that --

JUSTICE ALITO: Well, why would it not?

GENERAL CLEMENT: Well, first of all, there's obviously a limiting principle in our theory, which is to say that the President can't take any action pursuant to this which is inconsistent with other constitutional obligations.

CHIEF JUSTICE ROBERTS: But he can -- he can take action that's inconsistent with the determination of Federal law by this Court?

GENERAL CLEMENT: No, Mr. Chief Justice, I don't think that's true.

CHIEF JUSTICE ROBERTS: I thought we

determined in Sanchez-Llamas that the treaty did not mean what the ICJ said it means in this case.

GENERAL CLEMENT: That's exactly right as to the Vienna Convention. But this case raises a question, not about the proper interpretation of the Vienna Convention, because as you remember we were four-square with this Court on its interpretation of the Vienna Convention in Sanchez-Llamas. The relevant treaties here the Optional Protocol and the UN Charter, and the question here is not the force of -- of the Avena judgment as precedent --

CHIEF JUSTICE ROBERTS: Do you doubt that the judgment here is based on a determination of the Vienna Convention that's exactly the opposite of what we determined last year?

GENERAL CLEMENT: No doubt at all, Mr. Chief Justice. And we think with respect to anyone but the 51 individuals that are covered by the judgment that of course this Court has the final word on the interpretation of the Vienna Convention.

JUSTICE SCALIA: They were not parties to it. What do you mean, "covered by the judgment?" Is this some -- some new kind of new kind of jurisdiction? If you're named in a suit by somebody else, you somehow acquire rights under that suit? I

don't know of any such principle.

GENERAL CLEMENT: Justice Scalia --

JUSTICE SCALIA: These people were not parties to the -- the countries were parties to the judgment.

GENERAL CLEMENT: Of course the countries were parties, but these 51 individuals' claims were specifically adjudicated. Why were they specifically adjudicate? Because they were effectively -- the claims were espoused by the Mexican Government. That system --

JUSTICE GINSBURG: General, can we just clarify something which I think is important? Justice Scalia suggested that this wasn't self-executing. The State Department with respect to the Vienna Convention itself told Congress very clearly: You don't have to do anything; this is self-executing. And then the protocol says: We the United States agree to accept the jurisdiction of the ICJ in a certain class of cases. And Congress ratified that, too. So I don't think that self-executing has anything to do with this case.

GENERAL CLEMENT: Well, Justice Ginsburg, I think that reflects that self-executing is one of those words that people use to cover a lot of different meanings; and I think in its most correct sense, you're right to say that the Vienna Convention is

self-executing.

So there didn't have to be legislation before Texas and its local officials were obligated to provide notice in this case; and of course, it's their default on that treat obligation by the State and local officials that has us in this predicament in the first place.

Now, there's another meaning of "self-executing", or maybe it's a misuse of the term, to say whether it gives rise to individually enforceable rights in court without more. And we do take the position that if the President had done nothing, and certainly if the President had said we're not going to comply, we're going to respond to this ICJ judgment the way we did with the Nicaragua judgment, we don't think that this judgment would be enforceable as of its own terms.

JUSTICE GINSBURG: But in Nicaragua the United States took the position from day 1 that the ICJ had no jurisdiction over the case. So the absence of jurisdiction is always an exception to the obligation, even within the United States, to give full faith and credit. If the court had no jurisdiction, another State doesn't have to give full faith and credit. But if it does have jurisdiction, then the obligation kicks in.

GENERAL CLEMENT: That's absolutely right, and that gets back to the basic principle of reviewing foreign judgments; and it's not that this Court is disabled from its judicial role. It's just the judicial role here is not a straight-up question of the interpretation of the Vienna Convention. It's a question of what effect to give the judgment that's been effectively validated by the executive branch. And there's two things --

JUSTICE STEVENS: You're arguing it's just the normal choice of law problem, that even though the judgment's clearly wrong on the matter of international law, if the court had judgment -- had jurisdiction to enter the judgment, we must treat it as binding?

GENERAL CLEMENT: That's -- that's right, Justice Stevens. As Justice Ginsburg put it --

JUSTICE STEVENS: That's provided that we regard these individuals as though they're tantamount to the parties to the judgment itself.

GENERAL CLEMENT: I think that's right, and certainly our obligation under that judgment as the executive branch sees it is to these 51 individuals as their claims have been espoused by --

JUSTICE KENNEDY: Suppose the President had reached the contrary conclusion, a hypothetical we put

earlier. Supposed the President had told Texas, do not follow this judgment?

GENERAL CLEMENT: Then I'd be on that side of the podium, Your Honor. I mean, we would take the position that the President's authority here is, in his view of this, is a necessary step; and that seems to be --

JUSTICE KENNEDY: I agree that we should give that determination great weight, but that's something quite different from saying that he can displace the authority of this Court on that issue of law.

GENERAL CLEMENT: Oh, but the -- the President can't displace the role of this Court. It's just that the role of this Court in a situation where there's been a judgment and the executive branch has viewed that judgment as something we should comply with, then the role of this Court is limited to deciding whether there was jurisdiction to issue that judgment in the first place; and then the secondary role of this Court would to be to say, does the rule of law embodied by that judgment violate the Constitution. And that's why the answer to the Chief Justice's original hypothetical, about a sentence to 5 years for guards that had no notice -- that's a different case.

But here there's no colorable argument that the -- that the judgment here and what's embodied in it lies outside the power of the Federal Government as a whole to adjudicate and to put as an obligation on the States.

JUSTICE SOUTER: Mr. Chief Justice, may I ask a further - may I ask a further question?

CHIEF JUSTICE ROBERTS: Yes.

JUSTICE SOUTER: Let me try one other variation to make sure that I understand your argument. What if the President of the United States had said this judgment, the Avena judgment, will not be enforced, and this Court interpreted the Avena judgment as binding, as providing a rule of decision and a rule of decision which was entitled to respect by Texas?

Would this Court's authority to make that declaration and issue a judgment to that effect be displaced by the President's determination that it would not be that the Avena judgment would not be enforced?

GENERAL CLEMENT: Of course not, Justice Souter. That would just be like cases that unfortunately happen, where we would take a position that the judgment on its own is not binding and you would reject that position and that would be the law of the land.

JUSTICE SOUTER: Okay.

GENERAL CLEMENT: We don't suggest that we wouldn't comply with a judgment of this Court, accepting Mr. Donovan's first theory that the President's role here is unimportant.

JUSTICE SOUTER: So --

GENERAL CLEMENT: -- but we do think, we stick to our view that the President's role here makes this an easier case and is in our view dispositive.

JUSTICE SOUTER: But it does follow then from what you've said that if we take exactly the position that I outlined in my hypo, we could avoid the entire question of presidential authority.

GENERAL CLEMENT: You could. I think another route, of course, that would be available to you is to simply say: Here we have a judgment and we have the President effectively espousing the judgment, and in those cases we don't have to worry about what would happen if we didn't have one or the other.

JUSTICE SOUTER: That's in effect a judicial version of one of the variants in Justice Jackson's hypo in the Steel case --

GENERAL CLEMENT: Exactly.

JUSTICE SOUTER: He's talking about the President and Congress; we're talking about the

President and the Court.

GENERAL CLEMENT: Right.

JUSTICE SOUTER: Yes.

JUSTICE SCALIA: The President espousing the judgment -- Texas takes the position that this memorandum has -- has no legal effect; it's a memorandum from the President to the -- to his attorney general. It's not a directive to the States. In fact, it even refers to pursuant to the principles of comity, which suggests, you know, do it if you want to be cooperative, don't do it if you don't want to be cooperative.

What is your response to that? And would it be enough if the President simply wrote a memorandum to himself saying that, I think this is the way that the -- that the judgment of the ICJ should be enforced? He doesn't have to tell Texas. He can just tell his attorney general?

GENERAL CLEMENT: Well, Justice Scalia, I think there's two questions there. I'd like to try to answer them both. One is, what degree of formality is required? And we would say that if you look to historical practice, this is not something where you a need a high degree of formality. So look to the executive agreement that this case -- this Court gave its positive effect to in Belmont and Pink. It was an

exchange of diplomatic letters, nothing more. Look to the executive determination that this Court give dispositive effect to, dismissed the lawsuit completely in Ex Parte Peru. It was a letter from the undersecretary of state to the attorney general.

Going back to the very beginnings of the nation, look at the extradition of Thomas Nash. What was the form of the President's determination we would extradite him? A letter from the secretary of state to Judge Bee in South Carolina.

CHIEF JUSTICE ROBERTS: In none of those cases were we talking about a determination contrary to a legal determination by this Court concerning the scope of powers under the treaty.

GENERAL CLEMENT: Well, with respect --

JUSTICE KENNEDY: And in Nash he was being held under Federal custody. So Nash is just inapplicable here.

GENERAL CLEMENT: Well, I don't think Nash is inapplicable, Justice Kennedy; I think it is on all fours.

JUSTICE KENNEDY: Of course, Nash is just a wonderful speech by Marshall anyway; it's not an opinion.

GENERAL CLEMENT: But it is a wonderful

speech, and I really do think you should take a look at that speech. If you want to find it, it's actually appended to volume 18 of the U.S. Reports. And I think you should look at that speech before rejecting our position here, because it really is on all fours in that there you had a treaty obligation duly approved by the Senate, and there was a question: Do we need an act of Congress before the executive can extradite somebody? And Marshall I think put the law exactly right in that case when he said: Sure, Congress can make a determination and if it does, that's the end of matter; but absent the congressional determination, the President has the authority to extradite Nash.

Now, that's a situation where somebody's personal liberty was at stake. So I would say that in some respects it's a fortiori that in this case what's at issue is simply recognizing that there's binding Federal law here, that I think if the Texas court had recognized that it was binding Federal law, it would have applied under their own State procedural default law.

Now, just to finish up, and then I will sit down, there's a second part of your question, Justice Scalia, which was addressed to what does the reference to comity mean. Obviously, from the very beginning in

this case we have taken the position in this Court that the President's memorandum directs the State courts, in its words, to give effect to the Avena judgment -- not decide whether you want to give it effect based on your State law of comity, but give effect to the judgment.

I think if you actually look at the law of comity, one of the things that it talks about is comity is really what the courts should do in the absence of a controlling view from one of the political branches. Here the President has made clear, it's clear to me what the answer is applying comity, which would be to give effect to the judgment.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Cruz, by my count we'll give you an extra 10 minutes.

ORAL ARGUMENT of R. TED CRUZ,

ON BEHALF OF THE RESPONDENT

MR. CRUZ: Mr. Chief Justice, and may it please the Court:

The entirety of the United States's argument is predicated on the idea that the President's two-paragraph memorandum is in and of itself binding Federal law.

JUSTICE SOUTER: Well, that's the -- that's

the argument, but your brother the Solicitor General has conceded that if we take the position in this case that there is a -- a rule of decision that should be respected in this Court and, hence, the subject of a judgment to Texas that, among other things, would suspend Texas's procedural bar law -- that that would obviate the question of presidential power.

MR. CRUZ: There's no doubt, if the Court decided it on the ground that Avena was a binding judgment, the President's order would be unnecessary.

I would note the United States strenuously disagrees with that proposition. And, indeed, the United States explicitly disclaims these treaties as the source of his authority; in fact, expressly agrees with this Court's decision in Sanchez-Llamas.

JUSTICE BREYER: Maybe you could spend a minute explaining that, because, as I read the Constitution, it says all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State -- I guess it means including Texas --

(Laughter.)

JUSTICE BREYER: -- shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Now, as I understand it, the United States entered into a treaty. That treaty said we will follow the interpretations and the judgments of the International Court of Justice in respect to the Vienna Convention.

And that Court did make a judgment in that respect, in respect to this client, and it said: Our judgment is that Texas, or someone in the United States, must redo the procedural hearing simply to see whether, in deciding whether there's prejudice or whether there's a procedural default, full account is taken of the importance of the Vienna rights. That's what we're talking about.

It's a judgment of the court. The United States has promised to follow that judgment of the court. The Constitution says, since it promised by treaty, that is the law; and the law binds the States.

That may be simple-minded, but I'd like to hear what the answer to that, rather, chain of logic is -- chain of law.

MR. CRUZ: Certainly, Justice Breyer. Texas, of course, does not dispute that the Constitution, laws, and treaties are the supreme law of the land. And Texas statutes must give way to any of these three.

The President's memorandum is none of those three.

JUSTICE BREYER: I was not talking --

MR. CRUZ: And, with respect --

JUSTICE BREYER: -- about the President's memorandum at the moment. And to be -- to disclose fully what I'm thinking, I'm thinking that maybe if a president disagreed in such a thing, some kind of a question -- I'm not sure what -- would be presented.

But whatever "what," I don't worry about that "what" here, because the President, too, agrees.

MR. CRUZ: Justice Breyer, the -- the answer to your question is the Avena decision is not a judgment in the sense we recognize judgment in U.S. courts for six separate reasons.

JUSTICE BREYER: No, forget whether we recognize it this way as a judgment. I'm saying we promised in the treaty to follow that thing. Call it whatever name you want. We promised to follow that thing, which I have in front of me -- excerpts of which -- called an Avena something. And we know what that says. I'm just looking to see what they call it. They call it -- well, you tell me what they call it. They call it -- it is not called the word "judgment." It's called: "The appropriate reparation in this case

consists of the obligation of the United States to" -- and then they listed it.

So I take it we have promised to carry out that obligation by treaty.

MR. CRUZ: Except that when the Senate ratified the Optional Protocol, it made clear that the Optional Protocol was not self-executing. Indeed, a point Mr. Donovan made in his argument --

JUSTICE BREYER: What are the words that the Senate said? Because, when you say "self-executing," the easiest way for me to understand that is the Constitution means what it says.

But there happened to be a few instances where the nature of the obligation or the intent of the party makes it very difficult to enforce it as a binding judgment of a court. That is not this case.

MR. CRUZ: This -- this Court has made clear for 200 years the Senate can ratify a treaty and yet leave it not self-executing in the sense that it is not enforceable in U.S. domestic courts.

JUSTICE BREYER: Oh, and so if they did that, now, will you quote the words or give me the reference where the Senate said: Although we entered into this and although we ratify it, we're not going to do it --

MR. CRUZ: Well --

JUSTICE BREYER: -- unless you --

MR. CRUZ: The text of the treaty, itself, is the first place to look. The text of Article 94 of the UN Charter provides that the remedy is that the party may have recourse to the Security Council.

JUSTICE GINSBURG: That's after there's a breach, but we -- let's stick to the protocol, the Optional Protocol -- optional. The protocol says:

We accept the compulsory jurisdiction of the ICJ. "Jurisdiction" means power. We agree that in cases of this character, Vienna Convention violation cases, we submit to the jurisdiction of X tribunal, the ICJ.

What is there that needs execution about that? Congress said yes, the United States, the Executive Branch of the United States decides that it's a good idea to submit to the -- to the jurisdiction of the ICJ. We ratify that.

And I don't see anything left for Congress to do. It said the United States can submit to the jurisdiction of the ICJ.

MR. CRUZ: "Jurisdiction" in that sense is not "jurisdiction" in the sense of a U.S. court. Rather, it is an international obligation that is to be

resolved through political and diplomatic avenues. And the best example of that --

JUSTICE SCALIA: It just means we agree that the case can go before the court.

MR. CRUZ: Exactly.

JUSTICE SCALIA: And we will be a party before the court. Isn't there some doubt whether the -- the Senate and the President, together, can -- can take away from this Court the power and responsibility to decide what the treaty obligations of the United States are?

MR. CRUZ: Justice Scalia, I --

JUSTICE SCALIA: Isn't there some problem there?

MR. CRUZ: I would go further than some doubt, and I would say that if the treaty purported to give the authority to make binding adujudications of Federal law to any tribunal other than this Court, that it would violate Article III of the Constitution.

JUSTICE BREYER: Fine. Then, are you saying there are -- there are 112, I believe, treaties in which we've entered into promises that we're going to follow what an international tribunal said. Somebody looked up, I saw on the Internet, that at this moment there are approximately 116 regulatory entities in the

world where we've entered, or others have entered into, regimes, where there are various adjudicatory tribunals of different kinds, mostly commercial, that bind us.

And is your view: All of these thousands, perhaps, or hundreds, anyway, of treaties are unlawful, and that our promises are not enforceable, because there's a constitutional question?

MR. CRUZ: There are hundreds of treaty obligations that this nation is committed to that are not self-executing, that don't immediately have force --

JUSTICE BREYER: No. No. I'm thinking that are self- executing. I'm thinking that there are -- like WTO, NAFTA. We can go down a long list of instances where the United States has promised to follow the decisions of tribunals that are not Article III courts and to put them into effect at once.

MR. CRUZ: If -- if --

JUSTICE BREYER: And I wonder, without further ado, now, are you saying that all those are unconstitutional?

MR. CRUZ: In -- in those instances --

JUSTICE BREYER: "Yes" or "no"? I'd appreciate a "yes" or "no" answer.

MR. CRUZ: No. No, we are not saying that.

JUSTICE BREYER: Okay.

MR. CRUZ: In those instances, the bodies in question are not making definitive interpretations of what Federal law is. The best illustration of this is the example Mr. Donovan used in his opening argument where he said, if the ICJ said to the United States cease hostilities, that would be directed to the President.

Now, under Mr. Donovan's argument, that's a clear directive. The United States is bound by treaty, and apparently the Federal courts could order the President to cease hostilities if that was the instruction of the ICJ.

JUSTICE BREYER: I'm sorry. What I don't understand about this is that I thought that the ICJ in this case interpreted the treaty. That's not Federal law. That's the treaty. And it said that the treaty --

MR. CRUZ: The treaty is Federal law, Justice Breyer.

JUSTICE BREYER: Oh, then I don't understand you because the WTO interprets a treaty. It interprets a treaty that binds the United States, just like the ICJ is interpreting a treaty that binds the United States. So what's the difference?

MR. CRUZ: The nature of this treaty, every -- every position -- the United States State

Department at the time it was introduced, the Senate, and every member of the Senate who discussed it, understood that the decisions of the ICJ would not have binding effect in U.S. courts. And that is identical to the understanding of every single nation --

JUSTICE KENNEDY: And what you are saying -- and this has been the law --

JUSTICE STEVENS: May I ask a question, please?

JUSTICE KENNEDY: Go ahead.

JUSTICE STEVENS: It's critical to me to understand the effect of the judgment, and you said there are six reasons why it's not an ordinary judgment. I really would like to hear what those reasons are without interruption from all of my colleagues.

(Laughter.)

MR. CRUZ: I would be happy to provide those, Justice Stevens. The first reason is because the Optional Protocol is not self-executing, so it does not have force in United States courts.

The second reason is, if it was a binding judgment, that would violate Article III. It would give to a tribunal other than this Court the authority to determine Federal law.

The third reason is in Sanchez-Llamas a

majority of this Court rejected this argument and provided explicitly, quote, "nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.

The fourth reason is the parties in Avena were the United States and Mexico. Neither is a party to this proceeding. The argument as to why it is binding in this case is that Texas is vicariously part of the United States. That was equally true of Oregon in Sanchez-Llamas. In both cases, there's one State who is in some sense one of the parties.

The fifth reason is the Breard case was in many senses equally a judgment, in that you had the ICJ issuing an order to this Court concerning Breard, concerning his specific case, to stop his execution, and this Court concluded that that could not trump U.S. law.

And the sixth and final reason that it is not a judgment is to treat it as a binding judgment would be to cut out the President's authority not to comply. Everyone agrees, for example in the Nicaragua case, that the President retains the authority to say no, we're not going to comply.

Which is why the entire purpose of this adjudication is not to resolve something finally in a court of law, but it is rather a diplomatic measure,

much as -- much like when the United States sued Iran during the hostage crisis. We didn't believe the Ayatollah was going to listen to the ICJ and suddenly let the hostages go. We didn't -- we didn't expect that Iranian courts would give force to it, but it was helpful diplomatically to bring it to that tribunal to then put international pressure. That --

JUSTICE KENNEDY: Then this is consistent with what you've been explaining to Justice Breyer in your answer, that for 200 years we have had some treaties that are very important, but they're not self-executing; their violation may put us in violation of international law; but it is for us to determine how we are going to comply with the international obligation; and there is no obligation on the part of the State to comply with that law because it's not self-executing.

MR. CRUZ: Justice Kennedy, that is exactly correct.

JUSTICE KENNEDY: At some point I think in the course of your argument, we may get back to whether the Vienna Convention itself is or is not self-executing. I think the Solicitor General was correct in saying that that's a difficult word. I think it is self-executing in that the State has to comply

with it.

I'm not sure that it is self-executing in that the State has to accept whatever procedural framework the foreign national demands.

MR. CRUZ: I would agree with the characterization you suggest, which is that the Vienna Convention was self-executing in the sense that it didn't require legislation to go into effect, but it was not self-executing in the sense that it provided judicially cognizable rights.

But let me add a caveat to that, which is in both Breard and Sanchez-Llamas, this Court assumed the Vienna Convention created individual rights, and although Texas maintains that it did not create individual rights and the United States maintains that it did not create individual rights, we don't have to win on that proposition to prevail in this case. Even assuming it created individual rights in this case, Medellin defaulted on that claim and this Court held with Sanchez-Llamas that procedural default is consistent with the treaty.

And the real question here in this case, particularly with respect to the President's order, is whether the Optional Protocol is self-executing, the decision of the Avena court, or, as a subsequent matter,

whether the President has some sort of independent authority to make Federal law.

And in this respect --

JUSTICE GINSBURG: Well, I still -- I would like to get back to that Optional Protocol. It -- was it submission to jurisdiction? My understanding is that any two parties that can agree, can have a formed selection clause, can agree that we accept the authority of this tribunal, and then it follows from that that if you accept their authority to adjudicate, you are bound to follow its decisions. And that that seems to be understood in the world community because, is it not so that even though there are cases like Nicaragua and Iran, most ICJ judgments are indeed complied with by the nations that agree to submit to the jurisdiction of that tribunal?

MR. CRUZ: Justice Ginsburg, that is correct as a political and diplomatic matter, but in my judgment it speaks volumes that of the 166 nations that signed on to the Vienna Convention and of the 50 nations that signed on to the Optional Protocol, zero -- not a single nation -- treats ICJ judgments as binding in their domestic courts.

What Petitioners are arguing here is for an interpretation of this treaty that no other nation

gives. And in fact, if I found myself in the nation of Mexico and arrested without consular notification, I could not raise this claim in Mexico. The Mexican courts would not treat it as a defense to my criminal prosecution.

And so --

JUSTICE GINSBURG: Do you have a case that says that? A Mexican case that says that?

MR. CRUZ: I do not have a case that says that, but neither Petitioner nor their many amici have been able to point to a single instance.

JUSTICE GINSBURG: Maybe it hasn't come up.

MR. CRUZ: Given that these treaties are four decades old, that that speaks volumes that no -- no nation has accorded binding force to ICJ --

JUSTICE BREYER: Maybe these other nations have an inquisitorial system where an investigating judge collects a dossier and the fact is noted in the dossier and the investigating judge and the prosecution give it such weight as it's entitled to.

MR. CRUZ: Justice --

JUSTICE BREYER: You know that doesn't happen?

MR. CRUZ: Justice Breyer, I -- I think you could well be right, but I think that also speaks to the

peculiar nature of this. Procedural default only --

JUSTICE BREYER: In an --

MR. CRUZ: -- matters in system like the United States' where habeas allows a second bite at the apple. Most other countries don't allow criminal defendants to relitigate criminal matters, in which case procedural default matters. The other countries simply deny it altogether.

JUSTICE BREYER: Of course it matters. But the -- of course it matters. That's why when I read the -- the ICJ opinion, I read it as saying that they're not telling you to set aside a procedural default rule. What they've asked you to do is to provide, by means of the United States' own choosing, review and reconsideration of the convictions and sentences by taking account of the violation of rights.

And throughout they ask -- when you decided whether the person was really prejudiced, when you decided whether there had been forfeiture of the rights, at that time, did you ask yourself that the reason he might not have raised them was because he knew nothing about them and his lawyer knew nothing about them, because nobody ever told either about them? In which case there might be a causal connection.

As I read it, the ICJ left all that up to

you but just asked you, please, look at it again having read our opinion and keeping this in mind.

MR. CRUZ: But the ICJ's decision -- I think your question goes back to Justice Ginsburg's question about the effect of an ICJ decision.

The legal -- legal adviser to the State Department told the Senate, when it was ratifying the UN Charter, that decisions of the ICJ are "a moral obligation" and there is "no provision" for the enforcement of such decisions. And one fascinating example of this is the entire debate over the Connally Amendment. One can look in the entire course of legislative history, and it's an argument back and forth about whether it is wise to require the United States to cast a veto in the Security Council over an attempt to enforce an ICJ. And not a single senator of the entire U.S. Senate suggested the proposition that ICJ decisions might be independently enforceable. Nobody discussing that understood it that way.

JUSTICE SCALIA: Once again, there is a constitutional problem, is there not, if they are automatically enforceable?

MR. CRUZ: Absolutely.

JUSTICE SCALIA: That is conferring upon the ICJ the responsibility to decide the meaning of a United

States treaty which is United States law.

MR. CRUZ: And --

JUSTICE SCALIA: I'm rather jealous of that power.

(Laughter.)

JUSTICE SCALIA: I think it belongs in this Court. And when you have a non-self-executing treaty, there is no problem.

It becomes U.S. law when the Senate and the House pass a law which the president -- it doesn't become U.S. law because the President writes a memorandum to his Attorney General, but it does become U.S. law when a law is enacted.

MR. CRUZ: And that --

JUSTICE SCALIA: That solves the constitutional problem, but in the situation we're talking about here, I don't know on what basis we can allow some international court to decide what is the responsibility of this Court, which is the meaning of the United States law.

MR. CRUZ: Justice Scalia, that's absolutely correct.

JUSTICE BREYER: And how does the WTO differ?

MR. CRUZ: The imperative --

JUSTICE BREYER: How does the WTO and NAFTA and all our trade agreements differ?

MR. CRUZ: The WTO and NAFTA -- I mean NAFTA is not a treaty. It's a congressional agreement, but it is also adjudicating specific factual questions that deal with the application of facts to a particular circumstance. It's not interpreting the treaty and purporting to bind the United States on this is what the underlying Federal law means.

JUSTICE KENNEDY: And the United States apparently accepts the verdict of those --

MR. CRUZ: Right. Right. And it could choose not to.

JUSTICE KENNEDY: You have three different things that you have to tell us about today: That the President's authority, the effect of the ICJ, and -- and the Avena judgment, and ultimately, the force of the Vienna Convention itself.

And the only question I have that I need your help with is as to the last, and I hope that it doesn't interrupt the train of your argument.

I think the ICJ -- pardon me, the Vienna Convention is self-executing, in that it requires the States to conform to the consular notification provision.

MR. CRUZ: And we don't disagree with that.

JUSTICE KENNEDY: Suppose you have a judge who has control over a defendant who's being held in custody pending trial, and the defendant says I want to see my -- my foreign counsel. The judge says no. Can you mandate that -- assuming State procedures allow him in, couldn't you mandate that judge to require him to allow the notification to take place?

MR. CRUZ: The consequence of the argument that it doesn't create individual rights would mean that that individual defendant could not raise it in that --

JUSTICE KENNEDY: You see where I'm going?

MR. CRUZ: Yes.

And so in that circumstance, it would mean, if a judge declined to comply with that obligation, the individual defendant would not have an appealable legal error.

JUSTICE KENNEDY: If I thought he did, would I still have to rule against you?

MR. CRUZ: No, not at all. In fact, just as this Court did in Breard and Sanchez-Llamas, it assumes that the Vienna Convention created individual rights. And so we don't need to prevail on that to reach the identical outcome. Because even assuming we are incorrect concerning individual rights, the

Sanchez-Llamas holding is that procedural default respects those rights just as fully as it respects constitutional rights.

JUSTICE GINSBURG: But --

JUSTICE KENNEDY: Could I make a distinction between failing to let him see the counsel at all in my hypothetical and a demand that the procedural framework be altered? Isn't there a distinction between those two cases, do you think?

MR. CRUZ: I think that's right. I think also in your hypothetical, your hypothetical assumes a - a deliberate violation of the law which no one suggests here rather than inadvertence. And inadvertence complied with, as you suggested earlier, no prejudice whatever so. And there has -- both the Federal and State courts that looked at this concluded that there was no even arguable prejudice from the violation.

JUSTICE GINSBURG: Mr. Cruz --

JUSTICE STEVENS: Mr. Cruz, could I go back to your discussion of whether this is a judgment or not? It seems to me some of your reasons actually go to whether the -- whether it was a correct interpretation of the treaty. And if it were a judgment, would you agree that this Court would have to accept it, even if this Court disagreed with its legal analysis?

MR. CRUZ: Justice Stevens, I would not, because I do not believe consistent with Article III this Court's authority can be given away by treaty.

JUSTICE STEVENS: How is it given away to a treaty if it just says one State court must honor a judgment of a sister State even if it thinks it's dead wrong? Is it giving away its judicial authority by obeying the Full Faith and Credit Clause?

MR. CRUZ: That is provided by the Constitution. And in this instance, giving any other entity, the authority to make a conclusive determination of Federal law, that goes to the heart of the Article III power.

JUSTICE GINSBURG: Are you saying that even --

JUSTICE STEVENS: Even if it was agreed by treaty to give it conclusive effect?

MR. CRUZ: If the Senate agreed that this was self-executing, then you would have the height of the Presidency and Congress working together. But even in that situation, I would submit as a matter of separation of powers, they could not give this Court's essential role, under Marbury, to say what the law is to another body.

JUSTICE GINSBURG: Then we couldn't have a

treaty with another country on the mutual recognition and enforcement of judgment, because the other country might get it wrong, we might disagree with its interpretation of the law, and, therefore, unlike the rest of the world, the United States can't get the advantage of a reciprocal guarantee that our judgments will be respected, and in turn we will respect your judgment.

MR. CRUZ: In enforcing foreign judgments, the foreign court is not purporting to make a definitive determination of U.S. law.

JUSTICE GINSBURG: It may be that if the case turns on a question of U.S. law, and we may think, as many think about the ICJ, that they got that question wrong. Still, it's always been if you don't look behind the judgment. You say in the next case I'm certainly not going to apply that wrong interpretation. But here I'm bound by a judgment.

And that's why I questioned your use -- your heavy use of Sanchez-Llamas. I agreed with the court in that case because it was a question of interpretation. We don't have to agree with the ICJ. We were not faced with a decision, a binding adjudication, which we accept for that case only. So there's a difference between Sanchez-Llamas and this case that you appear not to

recognize in your brief.

MR. CRUZ: Justice Ginsburg, it has been the consistent position of the United States for over four decades from the day this treaty was ratified that the Optional Protocol was not self-executing, was not enforceable in U.S. courts. So it is not a judgment that has -- were this Court to treat it as -- as a judgment, it would be making that treaty self-executing. And the power to transform a non- --

JUSTICE GINSBURG: I thought you said that -- oh, you said that this is a matter of goodwill or that most ICJ judgments -- ICJ judgments, they're not binding but people comply -- nations comply with them as a matter of goodwill?

MR. CRUZ: Justice Ginsburg, that's exactly correct. And the President had a number of constitutional means at his disposal to comply, had he chosen. The -- but --

JUSTICE GINSBURG: What could -- other than -- I mean, the most logical place to have this go on is the court that rendered the judgment. It's always better for the court that rendered the judgment than some foreign court or another State court.

So what else could the President do? The ICJ did say U.S., as a matter of your own choosing. And

the President chose the most logical forum, but what else could he have done?

MR. CRUZ: There are three avenues that the President could have chosen that would have been constitutional. The first of which he could have gone to Congress and proposed a statute amending the AEDPA to allow Federal habeas review.

The second is he could have negotiated a treaty, submitted it --

JUSTICE GINSBURG: Let's start with the first one. Why should this case be in Federal court? It's a state judgment that's in question.

MR. CRUZ: This Court has made clear that the Federal Government cannot expand the jurisdiction of the State courts. There is a State --

JUSTICE GINSBURG: But you can have the Federal court overseeing the State court and telling the State what to do? That seems to me practically much more of an encroachment on State authority than to say, State courts, you do it.

MR. CRUZ: Well, and --

JUSTICE GINSBURG: -- or to say Federal courts, you do it.

MR. CRUZ: A corollary --

JUSTICE SCALIA: A lot of people think

that's exactly right, that really we expanded Federal habeas jurisdiction quite improperly. But it happens every day, doesn't it?

MR. CRUZ: It does. And a corollary to this is if Congress could pass a statute creating a Federal right to review, and that Federal right to review under the principles of Testa versus Katt would have to be respected in the State court.

JUSTICE GINSBURG: Who would be doing the review?

MR. CRUZ: Well, if it were a Federal right to review, under Testa versus Katt, both the State and Federal courts would give review. Interestingly enough, if it were a new Federal right, it would clear the jurisdictional bar because the Texas jurisdictional bar allows an exception for a new law. So if Congress passed a new law that would be jurisdiction to raise --

JUSTICE GINSBURG: A law passed by Congress saying Texas dispense with your procedural bar rules?

MR. CRUZ: A law passed by Congress saying in order to give effect to the Avena judgments the 51 Mexican nationals at issue shall be entitled to review and reconsideration of whether there was prejudice from the denial of the Vienna Convention. That law would be respected equally.

I would suggest that Testa versus Katt, which Petitioner uses, is a case which powerfully supports Texas, because the principle of Testa versus Katt was there is one Federal law that must be applied equally in Federal courts and State courts. And the State courts are not at liberty to ignore Federal law.

This is a very curious assertion of presidential power. Because the presidential power is not directed at the Federal courts. It is directed at the State courts,and the State courts alone. And I would submit is the only instance I'm aware of, of a Federal mandate that falls only on the states, singles out the states, and commandeers those judges.

In over 200 years of our nation's history I'm not aware of any other directive from the President directly to the State courts and State judges.

JUSTICE GINSBURG: So what's absent in your view is Congress. You say that all of this could have been done --

MR. CRUZ: Absolutely --

JUSTICE GINSBURG: -- and Texas could have been ordered, but the President doesn't have the authority to do it just on the basis of the ICJ,

MR. CRUZ: And Justice Ginsburg, I think a powerful parallel is the decision of this Court last

near in Hamdan. In Hamdan the President was at the height of his war powers authority. And nonetheless, this Court concluded that he could not act contrary to the will of Congress.

Here his interests are far less than prosecuting war, and yet he is asserting the authority to go it alone, despite a consistent stream of congressional disapproval, both in ratifying these treaties and saying they're not self-executing and also in passing the AEDPA.

JUSTICE GINSBURG: The not self-executing in the position of the State Department, wasn't there -- in the parallel proceedings in Oklahoma, wasn't there a letter from the current -- the then current legal adviser telling Oklahoma that this is a judgment that's binding on all courts in the United States, State and Federal, and that the President has directed Oklahoma to comply? I think that was sent both to the governor and the other officials.

MR. CRUZ: This letter was sent out to all affected States, but it is -- the United States is quite candid in what they are doing. The department to its credit describes it as "unprecedented," and it goes further, if I may read a portion of page 5 of the memo, or memo page 6, rather: The President's memorandum is

sufficient to create a binding legal rule.

The department is not hiding what they're arguing. They're not arguing the treaties require it. They're not arguing any statutes requiring it. They're saying a two-paragraph memorandum from the President to a member of the cabinet is binding Federal law.

JUSTICE GINSBURG: Which -- which letter are you quoting? Are you quoting --

MR. CRUZ: I'm quoting the United States' brief in this proceeding, page 6 of the brief. On page 5 it also describes the President's power as "establishing binding rules of decisions that preempt contrary State law."

If that is correct, there is no reason why the President could not have directed his memorandum to the Federal district courts or even to this Court, and that is an extraordinarily broad power to be asserted on behalf of the executive.

JUSTICE SOUTER: Mr. Cruz, you have frequently emphasized the non-self-executing character of the optional protocol.

Is there any rule, any positive rule in existence today either of international law or domestic law that precludes this Court from being the implementing authority as opposed to the executive or

the executive and the Senate?

MR. CRUZ: This Court has the final authority to determine what Federal law is, and so if this Court determines that that's what the treaty requires, then that be federal law. Now I would suggest that would require overruling --

JUSTICE SOUTER: These treaties including the optional protocol.

MR. CRUZ: In my judgment, if the Court reached that conclusion it would be error. But --

JUSTICE SCALIA: I think you misunderstood. I thought he was asking whether if it is -- assuming it is not self-executing, this Court can execute it.

JUSTICE SOUTER: That's right. Yeah.

MR. CRUZ: In my judgment it would be wholly illegitimate for the Court to do so.

JUSTICE SOUTER: Why?

MR. CRUZ: Because --

JUSTICE SOUTER: What's the rule -- what is the positive rule of international and domestic law that precludes it?

MR. CRUZ: The rule is a constitutional rule, that the President makes treaties the Senate advises and consents. And the limitation --

JUSTICE SOUTER: They've made the treaty.

We have got the optional protocol. Whatever the optional protocol means is Federal law.

MR. CRUZ: The limitations the Senate put on are it as much a part of the treaty as the treaty itself, and the consequences --

JUSTICE SOUTER: But you're -- my point is, my -- I'm accepting as premise of the question the limitation which you assert, i.e., non-self-executing; and my question is, may the execution, if you will, be made by this Court? Is there an independent rule that precludes this Court from that role?

MR. CRUZ: If this Court did so, in my judgment it would be usurping the role of Congress. All right? Because the essence of the decision --

JUSTICE SOUTER: I don't mean to be disrespectful of your judgment but what do you base it on -- tradition?

MR. CRUZ: The essence of the decision by the Senate to say something is non-self-executing is to say if something in this treaty is going to change U.S. domestic law, you have to come back to us.

JUSTICE SOUTER: You're saying by -- by non-self-executing, they mean you have to come back to us? The terms --

MR. CRUZ: That's exactly what it means. If

you want to change U.S. law, come to Congress.

JUSTICE SCALIA: They mean it does not automatically become part of United States law.

MR. CRUZ: Indeed.

JUSTICE SCALIA: And it follows from that, that you have to change United States law?

MR. CRUZ: Exactly.

JUSTICE SCALIA: And it is not the function of this Court to change United States law.

MR. CRUZ: That's precisely correct.

JUSTICE BREYER: If you assume it is self-executing, just for one second, I'd like to find out -- you said that the President was unreasonable in a sense of saying Texas do that over again --

I assume the reason he asked Texas to have the hearing is because the ICJ knew -- and I guess maybe he knew -- that the only hearing they'd had on this subject -- as far as I can see; I looked at it, there didn't seem to be any evidence in respect to their finding that there was no prejudice. They said well, he had a lawyer, but that lawyer later got into quite a lot of trouble, I think.

MR. CRUZ: He had two lawyers.

JUSTICE BREYER: He had two lawyers. One got into trouble, and the other didn't?

MR. CRUZ: And they vigorously defended him.

JUSTICE BREYER: Okay, they vigorously defended him.

MR. CRUZ: The only argument --

JUSTICE BREYER: Fine. Fine. My point is there's no evidence of that.

MR. CRUZ: With respect, Justice Breyer, there actually is.

JUSTICE BREYER: There is? In the first habeas hearing?

MR. CRUZ: The evidence there is --

JUSTICE BREYER: I read the whole thing.

MR. CRUZ: In our appendix there is an affidavit from the Mexican Consulate. Once the Mexican Consulate started assisting Medellin, they prepared an affidavit, and the affidavit said if we had been contacted, we would have told you not to confess; and we would have told you to get a lawyer. The problem with that is Medellin confessed within about three hours of being arrested, and even the ICJ in Avena said that notification had to occur within 72 hours.

JUSTICE BREYER: What I'm thinking of is the evidence at the first habeas hearing that led the district judge to reach his conclusion that there was no prejudice and that the procedural default was not

excused -- it's in that hearing that I didn't see what that finding was based on; and I suppose the reason that the President wanted Texas to do it is it would be easiest for Texas to go back to that.

MR. CRUZ: Justice Breyer -- it was part of the State court record, and it was the basis for saying there was no prejudice.

JUSTICE BREYER: It was in the first hearing.

MR. CRUZ: I believe it was. And it's included in our appendix four.

JUSTICE BREYER: So you think there was no reason for the ICJ to ask the President --

MR. CRUZ: It is difficult to explain.

CHIEF JUSTICE ROBERTS: Was the basis for the determination of no prejudice the fact that the Petitioner in this case had received full Miranda warnings, which went beyond what the consulate was going to tell him?

MR. CRUZ: That is completely correct, and he waived those in writing.

JUSTICE SCALIA: And he had lived in this country for how long?

MR. CRUZ: Practically his entire life. Wrote and read English and was educated in American

public schools.

JUSTICE BREYER: And what did happen to the lawyers Texas gave him?

MR. CRUZ: Both of them vigorously defended him, and in Medellin we devoted several pages of our brief to going through in considerable detail the many motions they filed. It was a vigorous defense, and yet they failed to raise this particular --

JUSTICE STEVENS: And so they have -- the Texas Court of Criminal Appeals didn't adopt a simple solution of the case, to say He got all the protection; that there's no prejudice and therefore there's no treaty violation.

MR. CRUZ: The Texas Court of Criminal Appeals didn't have it as option to say, it would have been easier, one might say, to just go along. The President is asking you to do this, make the whole thing go away; just go along. The problem is the Texas Court of Criminal Appeals had a statute, and a statute that divested of jurisdiction unless there is new Federal law.

JUSTICE STEVENS: Yes, but that statute really would not have divested -- if I understand he Texas law correctly -- if you did agree -- which you don't, I know -- that there was a preexisting Federal

obligation to honor judgments of the ICJ, then under Testa v Katt principle and Howlett opinion and others, the Texas court would have had jurisdiction.

MR. CRUZ: Although that holding would be, I would suggest, in considerable tension if not directly contrary to Sanchez-Llamas.

JUSTICE STEVENS: Well, but Sanchez-Llamas doesn't deal with the judgment. And It says a separate Federal obligation --

MR. CRUZ: Oregon is as much a part of the United States as Texas.

JUSTICE STEVENS: Then I think the Texas -- there would be jurisdiction in the Texas court to entertain this claim. I think you -- you agree with that?

MR. CRUZ: I do not, because it has to be a new claim, and if this were a judgment, the judgment --

PLAINTIFF'S CO-COUNSEL: It would be a new claim based on a new judgment which was after Sanchez -- the Chief Justice's opinion in that case.

MR. CRUZ: Let me point out one consequence of -- of the President's assertion of authority.

JUSTICE STEVENS: Well, I'm -- you just -- for -- putting the President's assertion to one side, it seems to me if you did agree -- and I know you

vigorously don't -- that there were a pre-existing Federal obligation -- an obligation of the United States to respect the judgment of the ICJ, which is -- which we think is wrong as a matter of international law; we have previously construed the treaties to the contrary -- but if there were an independent obligation to expect -- Federal obligation -- respect that judgment, it seems to me that that obligation could be enforced in Federal court.

MR. CRUZ: I don't disagree with that, Justice Stevens.

JUSTICE STEVENS: You don't.

MR. CRUZ: If -- although I disagree with the premise.

JUSTICE STEVENS: Yes.

MR. CRUZ: But if the premise were true, I don't disagree with the conclusion.

The statute allows jurisdiction where there is a new legal basis that was not previously availability. The only two potential sources of that are Avena, which we submit is a non-self-executing international law obligation, or the President's order; and, in fact, it is worth underscoring if the United States' theory is correct, there's no reason why the President needed to wait for a decision from the ICJ.

If the President has the authority to take a non-self-executive international law treaty and order it to be implemented and set aside any State law to the contrary --

JUSTICE GINSBURG: Yes, there is. We have interpreted the law, and we have said as far as what Article 36 means, we disagree with the ICJ.

MR. CRUZ: I agree with you, Justice Ginsburg, but the United States does not. The United States believes that the President has the authority to make decisions and to implement treaties -- an independent authority to create new binding law, even though the obligation is not self-executing.

CHIEF JUSTICE ROBERTS: Thank you.

JUSTICE KENNEDY: How many parties to Avena -- there were 51 -- are being held in the State of Texas?

MR. CRUZ: There are 51. There were 15 in the State of Texas. There are now 14 because 1 was under the age of 18, so is now off of death row; 51 in 9 States across the country.

JUSTICE GINSBURG: And Oklahoma has taken the opposite position, and they -- they did give the review and reconsideration?

MR. CRUZ: That's correct.

JUSTICE GINSBURG: And has any other State acted?

MR. CRUZ: Not that we're aware of, no. There have -- the 51 -- my understanding is it's down to 44. For various reasons these individuals are not on death row but, other than Oklahoma, not related to the Avena decision.

CHIEF JUSTICE ROBERTS: Well, the fact that they're on -- on death row isn't at all significant because the judgment of the ICJ purports to vacate the convictions as well; isn't that correct?

MR. CRUZ: That's exactly right; and, in fact, in Paragraph 34 of Avena it asserted the authority to annul U.S. criminal convictions. So some of the hypotheticals coming from bench, under the ICJ --

JUSTICE GINSBURG: I thought the ICJ flatly refused Mexican -- Mexico said ICJ annulled the judgment. The ICJ said no, and it didn't vacate it, either. It just said that it did a reconsideration to see whether there was prejudice.

MR. CRUZ: Justice Ginsburg, you're correct they did not order the annulment. But in paragraph 34 they asserted they could order the annulment. They simply were choosing --

CHIEF JUSTICE ROBERTS: I'm looking at page

--

MR. CRUZ: -- not to in this case.

CHIEF JUSTICE ROBERTS: I'm looking at page 186. They require review and reconsideration of the conviction and sentence.

MR. CRUZ: That's correct. So it is not just the sentence; and, in fact, they, despite the fact that their statute does not allow them to have precedent in any other cases, they said in paragraph 151:

The fact that the Court's ruling concerned only Mexican nationals cannot be taken to imply the conclusion reached in the present judgment do not apply to other foreign nationals finding themselves in situations. They were in an unprecedented act recording the authority to bind U. S. Courts in a way, to the best of my knowledge, no --

JUSTICE GINSBURG: Their very own statute, the statute setting up the ICJ, makes it clear that is not the case. They can issue a binding judgment in the particular case. It has no precedential effect for other cases, not even within the ICJ.

MR. CRUZ: But they can issue a decision that can be enforced by the Security Council. And had they issued --

JUSTICE GINSBURG: Has that ever happened?

MR. CRUZ: It has gone -- for example, in the Nicaragua case, there was an effort to take it to the Security Council there.

JUSTICE GINSBURG: And the U.S. exercised its veto.

MR. CRUZ: Correct. And that's part of a diplomatic treaty, where it's between nations is -- is that it is not binding in the sense that the domestic courts will enforce it.

Indeed, if the ICJ had asserted the power it claimed to annul U.S. convictions, under the U.S.'s theory the President presumably could have issued an order effectively pardoning State prisoners despite the fact that the Constitution limits its pardon authority to Federal crimes.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.

Mr. Donovan, you have five minutes.

REBUTTAL ARGUMENT BY DONALD F. DONOVAN

ON BEHALF OF THE PETITIONER

MR. DONOVAN: Thank you, Mr. Chief Justice.

First, there is nothing in the ratification history that suggests that Avena made any assumptions about whether or not the Optional Protocol would be self-executing. The Connally Amendment went to the compulsory jurisdiction of the ICJ, and the discussion

to which Texas has referred is entirely about the international ramifications.

In fact, the Senate specifically declined to apply the Connally Amendment to the Optional Protocol. So that gets to the question that we have been discussing here, which is:

What is the scope of the enforceability of an ICJ judgment? There are obviously constraints to that. One is illustrated by the Chief Justice's hypothetical. That is, there are affirmative constraints in the Constitution, itself.

The second is illustrated by a point I made, but Mr. Cruz misunderstood, which is that the nature of the obligation emanating from the judgment is directed at a constitutional branch such as the obligation to enforce an active statute. Obviously, that is not enforceable in court.

If the nature of the obligation is to cease hostilities, that is obviously directed to the President and is not enforceable in court. And that's illustrated by the Nicaragua case in which the ICJ issued a judgment. Congress passed a statute that said it wasn't going to comply; and the President said he wasn't going to comply.

That, in turn, applies to the third

constraint, which is the political constraint, itself. The Nicaragua case illustrates that if the ICJ issues a judgment that the United States does not want to comply with, Congress can pass a statute to say we repudiate the obligation.

So the obligations that we are talking about here in which the ICJ judgment would be enforceable by an individual fall squarely in the class of cases that this Court has decided for two centuries where an individual has a right conferred by the statute.

And he walked into a court, and he asked that court to enforce that right, and he invokes that right in -- as in the Caffa core case, the Roucher case, cases going back to the founding.

And this Court has said when the right is of a nature to be enforced in a court of justice, this Court will enforce it. And that is all Mr. Medellin is asserting here: The right to enforce a right that is eminently suitable for judicial enforcement because it goes to the judicial process, itself.

The second point with respect to Article III: It cannot be the case that this Court can never enforce -- gives away its Article III authority when somebody else enforces a judgment. We know from the Comegys and the Abba cases that we have cited that the

Court has in fact said that when the U.S. submits a case to international adjudication that international adjudication is binding and it's not reexaminable in a U.S. court.

CHIEF JUSTICE ROBERTS: I read the Comegys case, however you say it, to be for the exact opposite proposition. There they were saying, this is an international arbitration, there's no reason to go behind it.

But the question of whether or not that arbitration is binding in the bankruptcy proceeding that was at issue there was very much one for the U.S. Supreme Court to make.

MR. DONOVAN: But that's because that was not part of what the court had actually decided, or rather that the international adjudication had actually decided. You think about, if the proposition is that nobody else but an Article III court can decide a Federal question, this Court could not have decided Mitsubishi. In Mitsubishi the Court sent Federal statute antitrust claims to an arbitration panel in Tokyo and said that the result would be everyone forcible so long as the panel actually took cognizance of the claim and actually decided it.

This Court if it evaluated the claim that

Mr. Medellin is entitled to review and reconsideration as a result of the treaty obligation under 94-1 and the President's determination that that treaty obligation will be given effect, this Court would be performing a supremely judicial function, that is it would be interpreting and applying Federal law in the form of a statute, which is exactly what the Supremacy Clause requests the Court to do.

With respect to --

JUSTICE SCALIA: Put precisely, it would be making it Federal law and then applying it. If you assume it's not self-executing, somebody has to make it to domestic law. Now, Congress can obviously do it by passing a law.

But you're saying the Court can do it, can make it dmestic law and then enforce it.

MR. DONOVAN: That assumes thatit is not self-executing, yes. But the whole question here is --

JUSTICE SCALIA: Yes, yes, ys.

MR. DONOVAN: -- when we're talking about self-executing here we're saying what branch is the obligation directed to. And what the Court has said time and time again is when the obligation is of a nature to be enforced in a court of justice it is directed to the judicial authority.

JUSTICE SOUTER: Then what you are saying if I understand you is that Justice Scalia was wrong when he said that would be making it Federal law. I think you were saying that would be a -- the branch that was responsible for determining how to execute, i.e., to apply, Federal law. Is that your point?

MR. DONOVAN: That's exactly right. The thing that makes the treaty Federal law is not the Court; it's the Supremacy Clause, which makes it supreme Federal law.

CHIEF JUSTICE ROBERTS: What is the authority -- I get back to where I started. I understood you to concede that we would have authority to construe the judgment if it provided, for example, for a punitive sanction against the officers. What is the basis under your theory for that authority?

MR. DONOVAN: Well, it's settled that a treaty cannot contravene an affirmative constitutional obligation. There would be -- if there was -- if the ICJ --

CHIEF JUSTICE ROBERTS: But it can -- it can contravene our interpretation of the treaty as a matter of Federal law.

MR. DONOVAN: There are two different treaty obligations. There's a treaty obligation under the

Vienna Convention, which this court has now dispositively interpreted, and there's a treaty obligation to comply. And it's the very nature of an obligation to put a dispute to a third party that you may not agree with the result, and that does not in any way compromise this Court's Article III authority to rest that judgment on an obligation committed to by the political branches, three treaties ratified by the President and Senate that said when this country commits itself to do something we're going to do it. Now we have the President of the United States saying that it's in the paramount interests of the United States for purposes of enforcing --

CHIEF JUSTICE ROBERTS: Do we have the authority to interpret the judgment of the ICJ?

MR. DONOVAN: The courts in enforcing that judgment would. Of course that would be part of the judicial enterprise. The applicable instrument is now the Avena judgment, pursuant to the treaties and the President's determination, independent sources. In applying that judgment, there may well be interpretive questions because the Avena judgment lays down standards and requires obligations and that would be part of the judicial enterprise.

CHIEF JUSTICE ROBERTS: So we have the

authority to interpret it, we have the authority to construe whether it's carry to the Constitution, but we do not the authority to consider whether it's consistent with Federal law?

MR. DONOVAN: That's right, because that's the very nature of enforcing a judgment: You do not re-examine the merits. You take the judgment and you enforce the judgment. And it's the judicial enterprise to construe what that -- it may be a question about construing that -- what that instrument requires, what that judgment requires. But it's the judicial function in enforcing that judgment that calls upon this Article -- the Court's Article III authority, and does not in any way compromise it, which in turn goes to the question about what the judgment requires. It requires prospective review and reconsideration. The Texas court didn't suggest that Mr. Medellin had received review and reconsideration. The ICJ made it clear that it had to be prospective, and one of the fundamental reasons for that is because the judgment says that the treaty rights have to be determined on it own. Mr. Medellin is entitled to show that the violation of the treaty standing on its own two feet and not filtered through a constitutional right affected -- that he is entitled to show prejudicie.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Donovan.

MR. DONOVAN: Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 11:30 a.m., the case in the above-entitled matter was submitted.)

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